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In the

Supreme Court of the United States

October Term, 1996

MARYLAND STATE DEPARTMENT OF EDUCATION,
DIVISION OF REHABILITATION SERVICES,

Petitioner,

v.

UNITED STATES DEPARTMENT OF VETERAN AFFAIRS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The following question arises out of the failure of the United States Department of Veteran Affairs to include in a building it constructed a site for the location and operation of a vending facility by a blind person:

Does the Randolph-Sheppard Act, which vests arbitration panels with the authority to determine whether the acts and practices of federal agencies are in violation of the Act, also authorize panels under 20 U.S.C. § 107d-2(b) to order federal agencies to remedy such violations?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the Maryland State Department of Education, Division of Rehabilitative Services (appellant below); the United States Department of Veterans Affairs; Jesse Brown, Secretary of the Department of Veteran Affairs; John T. Farrar, Under Secretary for Health, Department of Veteran Affairs; Michael B. Phaub, Director, Veterans Affairs Medical Center (appellees below); the National Federation of the Blind; and Donald J. Morris (intervenors below).

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PETITION FOR A WRIT OF CERTIORARI

The Maryland State Department of Education, Division of Rehabilitative Services ("MSDE") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The October 22, 1996 opinion of the United States Court of Appeals for the Fourth Circuit is reported at 98 F.3d 165 and is reproduced in the Appendix ("App.") at 1a-14a. The court of appeals' December 31, 1996 order denying petitioner's request for rehearing and suggestion for rehearing in banc is unreported and is reproduced at App. 15a-16a. The August 17, 1995 opinion of the United States

District Court for the District of Maryland is reported at 896 F.Supp. 513 and is reproduced at App. 17a-31a. The May 4, 1994 opinion and award of the arbitration panel is reported at 60 Fed. Reg. 55007 and is reproduced at App. 32a-39a. The October 15, 1994 final award of the arbitration panel is unreported and is reproduced at App. 40a-45a.

JURISDICTION

The court of appeals' opinion and judgment were entered on October 22, 1996. The order denying petitioner's timely filed petition for rehearing and suggestion for rehearing in banc was entered on December 31, 1996. This petition is filed within 90 days of that order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 20 U.S.C. §§ 107-107f. The text of these provisions is reproduced at App. 46a-64a.

STATEMENT OF THE CASE

This petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit, which holds that an arbitration panel convened by the federal Department of Education under the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f, has no authority to require a recalcitrant federal agency to take specific measures to cure its violation of the Act's affirmative command to allow blind vending facilities on its premises.

The Randolph-Sheppard Act was enacted in 1936 to provide employment for the blind on federal property by giving licensed blind persons the opportunity to become self-supporting through the management of vending facilities in federal buildings. For over 60 years, the Act has worked well in Maryland with the cooperation of federal

agencies, with the result that 53 of the 84 blind vending facilities in Maryland are on federal property. (J.A. 77, ¶3.)[1] One notable exception in Maryland, as throughout the United States, has been the Department of Veterans Affairs ("VA"). (J.A. 80, ¶16; 86-88.)[2]

The Act vests responsibility for interpreting and enforcing its provisions in the Secretary of Education, *see* 20 U.S.C. § 107a(a), who is authorized to designate a public agency in each State to perform a number of functions concerning the administration of the Act, including issuing licenses to blind persons for the operation of vending facilities on federal property in that State. *See* 20 U.S.C. § 107a(a)(5); 34 C.F.R. § 395.7. MSDE is the designated State licensing agency in Maryland that is responsible for carrying out these functions.

The Act requires that every newly-acquired federal government building contain a satisfactory site for a blind vendor's facility, and that the plans for the construction or substantial alteration or renovation of a building include a satisfactory site for a blind vendor's facility. *See* 20 U.S.C. §107a(d). The Act also requires the occupying federal agency to provide advance notice to the State licensing agency responsible under the Act for issuing licenses to blind persons of its plans to occupy, acquire, renovate or relocate a building "adequate to permit such State agency to

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[1] References to "J.A." are to the Joint Appendix filed in this case in the court of appeals.

[2] The record in this case reflects that the only blind vending facility operating on VA property is at the VA Medical Center in St. Cloud, Minnesota. That facility has been the subject of extensive litigation. *See, e.g., Minnesota Dept. of Economic Security v. Riley*, __ F.3d __, 1997 WL 78402 (8th Cir. Feb. 26, 1997).

determine whether such building includes a satisfactory site or sites for a vending facility." *Id.*, § 107a(d)(1).

In this case, the VA began construction of a new Veterans Affairs Medical Center ("VAMC") in Baltimore, Maryland, in August, 1987; space allocation in the building was completed in 1989. (App. 5a.) The VA never gave notice to MSDE, the State licensing agency designated to administer the blind vendor program, of the VA's intent to construct and occupy a new building, either before or after construction was completed, nor did it make any provision for a blind vendor's facility. (App. 18a.)

Although never notified by the VA, MSDE became aware of the federal construction project and, on December 2, 1991, applied to the VA for a permit to operate a Randolph-Sheppard vending facility at the new VAMC Baltimore. (App. 5a; 18a.) After two additional inquiries by MSDE, the VA finally responded on April 6, 1992 by denying MSDE's request for a permit. (*Id.*) While the Act requires that one or more blind vending facilities be established on *all* federal property, it permits an affected federal agency to limit the placement or operation of a blind vending facility if it would adversely affect the interests of the United States. *See* 20 U.S.C. § 107(b); *see also* 34 C.F.R. § 395.30. To be granted such a limitation, however, the federal agency is required to submit a request to, and to obtain the approval of, the Secretary of Education. *Id.* The VA neither requested nor obtained a determination from the Secretary of Education approving the VA's refusal to place a blind vending facility at VAMC Baltimore. (App. 35a.)

The VA completed construction in July, 1992 and occupied the building in January, 1993, by transferring patients and staff from an existing VA medical facility in Baltimore. (App. 33a.) The new facility is two and one-half times larger than the old facility, and treats a

significantly greater number of patients with a larger staff. (*Id.*) While it does not have a site for blind vendors, the VAMC Baltimore does contain three concessions -- a cafeteria, a retail store, and vending machines -- that are operated by the Veterans Canteen Service and occupy a total of 20,000 square feet. (*Id.*)

The Act contains a dispute resolution system that provides that a State licensing agency may file a complaint with the Secretary of Education requesting arbitration whenever the agency "determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder (including a limitation on the placement or operation of a vending facility . . . and the Secretary's determination thereon). . . ." 20 U.S.C. § 107d-1(b). Upon receiving such a complaint, the Secretary of Education is directed to "convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter." *Id.*

MSDE filed such a complaint and the Secretary convened an arbitration panel consisting of three members -- one chosen by the licensing agency, one chosen by the federal property managing agency, and the third designated by the first two members -- which, pursuant to 20 U.S.C. §107d-2(a), held an evidentiary hearing and rendered a decision in accordance with 5 U.S.C. §§ 551-559 of the Administrative Procedures Act. The panel unanimously ruled in MSDE's favor, finding that the Randolph-Sheppard Act applies to VA medical centers, that the Act requires each new federal building to include a satisfactory site for a blind vending facility unless the Secretary of Education finds that this would adversely affect the interests of the

United States, and that the VA had not applied for an exemption from any of the Act's requirements. (App. 34a-38a.) To remedy the VA's statutory violations, the panel ordered the parties to enter into negotiations leading to a permit that would allow a licensed blind vendor to operate a vending facility at VAMC Baltimore. (App. 39a.) The panel further held that if the parties could not agree upon a permit, the parties were to submit proposed permit terms to the panel for its consideration. (*Id.*)

Although the panel's order gave the VA an opportunity to offer adequate space for a vending facility, the VA refused to enter into any negotiations whatsoever with MSDE. (App. 5a; 19a-20a.) Moreover, while MSDE submitted a timely proposed permit to the panel, the VA filed nothing other than a motion for reconsideration. (*Id.*)

On October 15, 1994, the panel issued a final award granting MSDE a permit to operate a vending facility at the VAMC Baltimore in accordance with the terms that MSDE submitted in its proposed permit. (App. 40a.) Because the VA had refused to participate in negotiations or to submit a proposed permit describing any acceptable sites within the VA, the arbitration panel was guided only by the VA's sworn testimony at the hearing. The VA's witnesses testified there that there *was no more space* in the VAMC Baltimore which could be allocated to a blind vending facility without dislocating medically related operations, and that the VA did not wish to allocate any additional space in VAMC Baltimore to a retail facility.[3] The panel

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[3] Michael W. Neusch, then Acting Medical Center Director, testified that allocation of even 250 square feet of space to a blind vending facility "would have a deleterious effect on patient care. . . .It would be my decision not to give up any space until all

(continued...)

thus ordered the VA to turn over operation of one of the three concessions at VAMC Baltimore, the retail store, to the licensing agency. (App. 41a.)

20 U.S.C. § 107d-2(b)(2) provides that if a panel "finds that the acts or practices of any [federal] department, agency or instrumentality are in violation of this chapter," then "the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel." Notwithstanding this statutory obligation, the VA simply ignored its duty to carry out the decision of the panel. (App. 6a; 20a.) Indeed, the VA refused to comply with the terms of the award or to provide any assurances of future compliance, even though the arbitration panel's decision is "final and binding" on federal agencies, *see* 20 U.S.C. § 107d-1(b), and MSDE made repeated efforts to resolve this dispute without judicial intervention.[4]

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[3](...continued)
of the clinical programs [needs] were met." (J.A. 69-71.) Dorothy Ann Snow, then acting Chief of Staff, testified that "it would be over my dead body if they expanded" space for retail services because "we have both clinical patient care area shortages and administrative shortages for office space for support systems." (J.A. 64-65.) The chief engineer at VAMC Baltimore, Richard Iafolla, also testified that the allocation of 500 square feet for a new vending facility would require the dislocation of other operations at the medical center. (J.A. 60-61; 58-59.)

[4] In response to an inquiry from United States Senator Barbara Mikulski, the VA stated that it would not comply with the Randolph-Sheppard Act, notwithstanding that its asserted legal basis for doing so had been rejected by the Court of Appeals for the Eighth Circuit. (J.A. 86-88.)

Because the VA had not taken such "action as may be necessary to carry out the decision of the panel" as required by § 107d-2(b) of the Act, MSDE sought enforcement of the arbitration panel's award in the U.S. District Court for the District of Maryland. The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1361. MSDE sought an order from the district court requiring the VA to comply with the arbitration panel's order. (App. 6a.) In the alternative, MSDE sought an order requiring the VA to comply with the Act by providing MSDE with a satisfactory site for a blind vending facility. (*Id.*)

After suit was filed, and despite its previous sworn testimony in arbitration that another retail facility at VAMC Baltimore could exist *only* by dislocating patient care operations, the VA for the first time identified alternative space in the VAMC and then sought to have the District Court review its proposal, rather than enforce the panel's decision, by calling its proposed sites a "final order" subject to APA review. (App. 6a.) MSDE declined the VA's offer because the proposed sites (currently being utilized as storage closets) could not provide a self-supporting income to a licensed blind vendor. (J.A. 186-89.) MSDE was able to identify a conference room that was of sufficient size and accessibility to support a vendor. The VA refused this counteroffer. (App. 21a-22a.)

After the parties filed cross-motions for summary judgment, the district court entered judgment for the VA. 896 F. Supp. 513 (D. Md. 1995) (App. 17a). The court held that it could not order compliance with the arbitration panel's order because the panel had no authority under the Randolph-Sheppard Act to award a specific remedy. The court found that while the arbitration panel could "review the agency action and determine if that action violates the Act," the panel could not do anything more because "under

the statute, it is the role of the agency head, in this case the Secretary of Veteran Affairs, to remedy any violation of the Act." (App. 26a.). Thus, the district court held that the Act places sole responsibility for remedying a violation with the federal entity that committed the violation. (App. 26a-27a.)

The court of appeals affirmed. 98 F.3d 165 (4th Cir. 1996) (App. 1a.) Asserting that the result that the district court reached was compelled by the "plain language" of § 107d-2(b)(2), the court stated that this statutory provision authorizes the arbitration panel only to "determine whether the federal entity is in violation of the Act, while the head of the federal entity will remedy the violation." (App. 9a-10a.) In reaching this holding, the court stated that it would "decline to follow the District of Columbia Circuit's interpretation of § 107d-2(b)(2)" in *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90 (1986), in which the court of appeals in that case concluded that an arbitration panel had broad -- as opposed to no -- remedial powers under the same statutory provision. (App. 12a.) Rejecting MSDE's contention that the interpretation adopted in *Weinberger* avoids absurd results, the court of appeals below held that "if a state licensing agency is dissatisfied with the response of a federal entity to an arbitration panel's decision, the state agency can file another complaint with the Secretary and have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance with the Act." (App. 12a-13a.) The court found that although "this solution may seem cumbersome," it is "dictated by the plain language of the statute." (App. 13a.)

The court of appeals subsequently granted the motion to intervene of the National Federation of the Blind and a licensed blind vendor, and denied MSDE's and the intervenors' petitions for rehearing and suggestions for rehearing in banc. (App. 15a.)

REASONS FOR GRANTING THE WRIT

This case presents issues of overriding legal and social significance that fundamentally affect the rights of blind citizens across the nation. Congress passed the Randolph-Sheppard Act, as set forth in the first sentence of this landmark legislation, "[f]or the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting. . . ." 20 U.S.C. § 107(a). The arbitration provision at issue in this case was subsequently enacted as one of several measures to ensure the attainment of these important goals and to maximize the benefits that blind persons are eligible for under the Act. The court of appeals' decision calls into question the effectiveness of this enforcement mechanism's application in innumerable situations, and seriously threatens an essential tool that lies at the heart of the Act.

Congress's enactment of § 107d-1(b)(2) reflects its recognition of the significance that arbitration serves in carrying out the broad purposes of the Act, and in eradicating widespread abuses that had been found to exist throughout the blind vendor program. This provision established, for the first time, a means for challenging federal agency decisions that adversely affected the location of blind vendor facilities on federal property. That recourse has now been eliminated. As a result, no device exists to enforce the Randolph-Sheppard Act against a defiant federal agency.

Worse, countless blind vendors throughout the country will be affected by this decision. The Act's reach is as broad as its sweep: it applies to every "department, agency, or instrumentality of the United States" that undertakes "to acquire by ownership, rent, lease, or to otherwise occupy,

in whole or in part, any building. . . ." 20 U.S.C. § 107a(d)(1). The rationale of the court of appeals' decision thus extends far beyond the Veterans Administration, the agency directly involved in this litigation, and provides a road map to other federal agencies on how they, too, may avoid complying with the Act without incurring any penalty. Certiorari is warranted to clarify both the applicability of this Court's prior decisions and Congress's intent in enacting this vitally important component of the Randolph-Sheppard Act.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS FASHIONING REMEDIES FOR VIOLATIONS OF FEDERAL LAW.

In holding that an arbitration panel has no authority to remedy a federal agency's unlawful refusal to comply with its obligations under the Act, the court of appeals has fashioned a rule that vests exclusive remedial authority with the perpetrator of that statutory violation. That rule is based on a serious misreading of the Randolph-Sheppard Act and a complete disregard of the presumption applied in this Court's decisions approving remedies when findings have been made that federal law has been violated.

Section 107d-2(b)(2) of the Act in pertinent part provides that when an arbitration panel finds that a federal agency has violated the Act, "the head of any such . . . agency . . . shall cause such acts to be terminated promptly. . . ." The court of appeals interpreted this language to mean that a federal agency that violates the Act has sole responsibility and discretion to end that violation, and, conversely, that the arbitration panel that finds the agency in violation of federal law has no authority to order the agency to remedy its unlawful actions. This interpretation substantially departs from, and directly

conflicts with, this Court's precedents.

This Court has recognized as a "general rule that all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 68 (1992). Applying this general rule, this Court has stated that it will "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise," *id.* at 66 (*citing Davis v. Passman*, 442 U.S. 228, 246-47 (1979)), and accordingly has "regarded the denial of a remedy as the exception rather than the rule." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 375 (1982). The court of appeals erroneously reversed "the traditional presumption in favor of all appropriate relief," *Franklin v. Gwinnett County Public Schools*, 503 U.S. at 69, because this case presents the general rule, not the exception.

The plain language of § 107d-2(b) vests arbitration panels with broad authority to issue decisions that ensure compliance with the overall goal of the Act that "priority shall be given to blind persons." 20 U.S.C. § 107(b). Rather than limit the power of arbitration panels to order remedial relief as the court of appeals held, the relevant portion of § 107d-2(b)(2) explicitly directs a delinquent federal agency to cease its violations of the Act "promptly" *and* to "take such other action as may be necessary to carry out the decision of the panel." *Id.* If, as the court of appeals held, the arbitration panel's authority extended only to stating whether the particular conduct of the agency violated the Act, there would be nothing for the agency to "carry out," *i.e.*, "to put into practice or effect" or "to follow or obey." *American Heritage Dictionary of the English Language* (1982) at 207. Such an interpretation contravenes the unambiguous wording of the Act and the

usual rule that when a finding is made that federal law has been violated, then a court "may use any available remedy to make good the wrong done." *Franklin v. Gwinnett County Public Schools*, 503 U.S. at 66 (*quoting Bell v. Hood*, 327 U.S. 678, 684 (1946)).

When read in conjunction with other provisions of the Randolph-Sheppard Act, § 107d-2(b) makes clear, as one court has noted, that "the Secretary of Education has broad remedial powers under the Act." *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d at 109. Section 107d-1(b), which governs the arbitration of disputes between a State licensing agency and a federal agency, places no limits on an arbitration panel's powers to decide and resolve disputes presented to it. Rather, this section provides that in resolving such disputes, "the decision of [such] panel shall be final and binding on the parties except as otherwise provided in this chapter." While § 107d-2(a) provides that the panel's decision "shall be subject to appeal and review as a final agency action" for purposes of chapter 7 of Title 5 of the United States Code, the latter establishes that a federal agency is not a "person" entitled to judicial review of final agency actions. *See* 5 U.S.C. §§ 702; 701(b)(1); 551(2). Consequently, a federal agency such as the Veterans Administration does not have the right to appeal, and is conclusively bound by, an arbitration panel's decision.

Thus, as the District of Columbia Circuit has found, the Secretary's "authority under the Act to provide *post hoc* remedies is broad." *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d at 109. Accordingly, if the Secretary "finds that the lack of notice here resulted in injury under the Act, the Secretary ought to be able to fashion an appropriate remedy, e.g., require the . . . Department to afford a blind vendor an opportunity at some, or all, sites." *Id.* Similarly, "if a violation is found, the

Secretary might well be able to require the government entities to place blind vendors somewhere on the entire property at issue, or require the specific buildings at issue to contain a satisfactory site for a blind vendor." *Id. See generally Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

Disagreeing with the District of Columbia Circuit's interpretation of § 107d-2(b)(2), the court of appeals below instead expressed its approval of the Eleventh Circuit's decision in *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482 (1990), in which the court stated that the arbitration panel "may determine that certain of the federal entity's acts violate the Act, but the Act leaves responsibility for remedying the violation to the federal entity itself." *Id.* at 1492. As the court below conceded, however, under this interpretation, "a federal entity can simply refuse to remedy the violations found by a § 107d-1(b) panel" and the States would be "left without . . . a review. . . ." (App. 12a.) This result runs directly counter to "the traditional presumption in favor of any appropriate relief for violation of a federal right." *Franklin v. Gwinnett County Public Schools*, 503 U.S. at 73.

In casting this presumption aside, the court of appeals' decision contravenes the well-settled principle that "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). The court of appeals' interpretation of the Act sanctions an enforcement scheme that is not merely "cumbersome" as the court acknowledged (App. 13a), but that will also inevitably "produce absurd results," *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982), in

virtually every dispute that arises under the Act between a State licensing agency and a federal agency.

As a result of the court's holding that an arbitration panel has no authority to order a federal agency to remedy its violation of the Act, the States have no means of preventing the federal government from avoiding its obligations in complying with the blind vendor program. Indeed, a State would have no redress under the Act even when a federal agency has acted as the VA has in this case by first ignoring the Act, and then by disregarding the decision of an arbitration panel convened by the Secretary of Education in response to a complaint that the State agency has filed against the federal agency. In such a case, the sole "remedy" for the State, according to the court of appeals, is to file another complaint with the Secretary and to request that another arbitration panel determine whether the federal agency's actions in response to the first panel decision have brought it in compliance with the Act. By simply continuing to make inadequate offer after inadequate offer, as the VA seems intent in doing in this case, the federal agency can avoid the Act altogether, without ever complying with any of its provisions. It is hard to imagine a more nonsensical and absurd enforcement scheme.

This is precisely the kind of abusive disregard of the Act that Congress intended to eliminate by passing the arbitration provision set forth in § 107d-2(b). From its inception in 1936, the Randolph-Sheppard Act was prevented from achieving its full potential, primarily because of substantial obstacles that federal agencies and federal employees erected. In an effort to remove these hurdles, Congress amended the Act, first, in 1954, and then again in 1974 by enacting § 107d-2(b) (among other provisions), to remedy these "widespread abuses of the blind vendor program. . . ." S.Rep. No. 1297, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373,

6397-98.

The court below agreed that the arbitration provision's legislative history "indicates that Congress intended to provide a final resolution of disputes arising from the administration of the Act," but then dismissed the significance of this history, stating that "it does not clearly express Congress' intent that the resolution of every facet of these disputes -- that is, both the fact of a violation and the appropriate remedy -- should lie with the arbitration panel." (App. 13a.) Congress recognized, however, that the authority granted to the Secretary of Education (then Health, Education, and Welfare), from whom the panel derives its authority, would result in "some incursion by that department in matters traditionally handled by other agencies." S.Rep. No. 937, 93d Cong., 2d Sess. 19 (1974). Congress nevertheless found that this federal department "has the expertness and the sensitivity to the problems inherent in the blind vendor program which may be lacking in other agencies. If the program is to be coordinated, well run, and consistent, it must have a coordinator. The only possible choice for this function is HEW." *Id.*

The legislative history of the Randolph-Sheppard Act thus runs counter to the court of appeals' conclusion that Congress meant to give an arbitration panel no authority to remedy a federal agency's violation of the Act. The court's disregard of that history and the Act's plain language has thrown the law, State licensing agencies, and blind vendors throughout the country into a state of confusion.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

Review is also warranted because the court of appeals' decision conflicts with decisions of other federal appellate courts. First, the court below expressly acknowledged that such a conflict exists, stating that it would "decline to follow" (App. 12a) the court of appeals in the District of Columbia Circuit, which recognized that the Secretary of Education, and thus an arbitration panel that he convenes, has "broad remedial powers" to ensure that a party aggrieved by a federal agency will receive "full relief." *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d at 109.

Second, the court's rejection of *Weinberger* in favor of the decision of the United States Court of Appeals for the Eleventh Circuit in *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482 (1990), creates a result that conflicts with a recent decision of the court of appeals in the Eighth Circuit. Relying on *Nash*'s holding that § 107d-2(b)(2) "does not authorize the arbitration panel to order the federal entity to take any remedial action," 915 F.2d at 1492, the court below concluded that a federal agency can simply refuse to remedy violations that an arbitration panel finds. (App. 10a-13a.) That conclusion cannot be reconciled with the subsequent holding of the United States Court of Appeals for the Eighth Circuit that a federal agency may neither "insist[] on a permit condition at odds with the [Arbitration] Panel's decision" nor "ignore[] its statutory responsibility to bring itself into compliance with the Act." *Minnesota Dept. of Economic Security v. Riley*, __ F.3d __, 1997 WL 78402 at *2 (Feb. 26, 1997).

Third, courts of appeals reviewing disputes between blind vendors and State licensing agencies have stated that,

in contrast to the decision below, an arbitration panel's authority under 20 U.S.C. § 107d-1(a) is broad and includes traditional remedial powers. *See Delaware Dept. of Health and Social Services v. U.S. Dept. of Educ.*, 772 F.2d 1123, 1136 (3rd Cir.1985) ("[T]here is not one iota of legislative history suggesting that, insofar as it dealt with the relief which arbitrators could award, the term [arbitration] was understood by any member of Congress to have any meaning other than the conventional one."); *Tennessee Dept. of Human Services v. U.S. Dept. of Educ.*, 979 F.2d 1162, 1165 (6th Cir.1992) ("We . . . conclude that the arbitration panel did not exceed its statutory authority in finding that Hinton [the aggrieved blind vendor] was entitled to retroactive relief against the state agency."). *See also McNabb v. U.S. Dept. of Educ.*, 862 F.2d 681 (8th Cir.1988), *cert. denied*, 493 U.S. 811 (1989).

Review is warranted to resolve these conflicts between the court of appeals' decision and the law of other circuits.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. Following review, the judgment should be reversed.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARYLAND STATE DEPARTMENT OF EDUCATION, Division of Rehabilitation Services,
Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF VETERANS AFFAIRS; JESSE BROWN, Secretary, Department of Veterans Affairs; JOHN T. FARRAR, Under Secretary for Health, Department of Veterans Affairs; MICHAEL B. PHAUP, Director, Veterans Affairs Medical Center,
Defendants-Appellees.

NATIONAL FEDERATION OF THE BLIND,
Amicus Curiae.

No. 95-2626

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frank A. Kaufman, Senior District Judge
(CA-95-8-K)

Argued: September 24, 1996

Decided: October 22, 1996

Before ERVIN, HAMILTON, and LUTTIG, Circuit Judges.

Affirmed by published opinion. Judge Hamilton wrote the opinion, in which Judge Ervin and Judge Luttig joined.

COUNSEL

ARGUED: Carmen Mercedes Shepard, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Baltimore, Maryland, for Appellant. William Charles Gleisner, III, GLEISNER LAW OFFICES, S.C., Milwaukee, Wisconsin, for Amicus Curiae. Stephen Woolman Preston, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF**: J. Joseph Curran, Jr., Attorney General, Caroline E. Emerson, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Baltimore, Maryland, for Appellant. Kenneth M. Zuber, GLEISNER LAW OFFICES, S.C., Milwaukee, Wisconsin, for Amicus Curiae. Frank W. Hunger, Assistant Attorney General, Lynne Ann Battaglia, United States Attorney, William Kanter, Jetfrica Jenkins Lee, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

OPINION

HAMILTON, Circuit Judge:

The issue in this case is whether an arbitration panel, convened pursuant to § 107d-1(b) of the Randolph-Sheppard Blind Vending Act (Act), 20 U.S.C. §§ 107-107f, has the authority to order a federal agency or department found in violation of the Act to take specific remedial action. Appellant, the Maryland State Department of Education, Division of Rehabilitation Services, asserts that the district court erred when it held that the arbitration panel convened in this case exceeded its authority when it ordered appellees, the United States Department of Veterans Affairs

(DVA) and individuals associated with the DVA,[1] to undertake specific remedial action. Finding no error, we affirm.

I.

Because this appeal involves the interpretation of a statute, it is helpful to begin our discussion with an overview of the Act and the statutory provisions at issue in this case.

A.

Congress enacted the Act to "provid[e] blind persons with remunerative employment, enlarg[e] the economic opportunities of the blind, and stimulat[e] the blind to greater efforts in striving to make themselves self-supporting." 20 U.S.C. § 107(a). The Act requires that all new buildings constructed by any federal department or agency contain within them a "satisfactory site . . . for the location and operation of a vending facility by a blind person." *Id.* § 107a(d)(1)(B). The Act provides that the Secretary of the United States Department of Education (Secretary) shall administer the Act and designate a state licensing agency, which will be responsible for implementing the provisions of the Act in each state. *Id.* § 107a(a). The responsibilities of the state licensing agency under the Act include issuing licenses to blind persons for operating vending facilities and administering the blind

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[1]In addition to the United States Department of Veterans Affairs, Maryland brought this action against Jesse Brown, Secretary of the DVA; John T. Farrar, Undersecretary of the DVA; and Michael B. Phaup, Director of the Veterans Affairs Medical Center in Baltimore, Maryland.

addition, the Act grants the state licensing agency the authority to select a location for a blind vending facility within federal buildings and to determine the type of vending facility to be maintained, though this authority is subject to the approval of the head of the department or agency in control of the building. *Id.* § 107a(c).

In addition to its substantive provisions, the Act provides a procedural mechanism for resolving disputes that arise out of the administration of the Act. Section 107d-1(a), for example, provides for a full evidentiary hearing before the state licensing agency for any blind licensee who is "dissatisfied with any action arising from the operation or administration of the vending facility program." 20 U.S.C. § 107d-1(a). A blind licensee who is dissatisfied with the agency's decision following such a hearing may file a complaint with the Secretary who shall convene an arbitration panel to settle the dispute. *Id.*

Section 107d-1(b) provides a parallel provision for a state licensing agency that is dissatisfied with the efforts of a federal entity to comply with the provisions of the Act. Under § 107d-1(b), a state licensing agency that believes a federal entity is failing to comply with the Act may file a complaint with the Secretary and the Secretary shall convene a panel to arbitrate the dispute pursuant to § 107d-2. *Id.* § 107d-1(b). Section 107d-2(b)(2) discusses the composition of an arbitration panel convened under § 107d-1(b) and provides that if the panel finds that the acts or practices of the federal entity are in violation of the Act, the head of the federal entity "shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel." *Id.* § 107d-2(b)(2). According to the Act, the decision of the panel shall be "final and binding" on the

parties. *Id.*

B.

The parties' dispute arose in 1987, when the DVA began construction of the Veterans Affairs Medical Center (VAMC) in Baltimore, Maryland without providing notice to the Maryland State Department of Education, Division of Rehabilitation Services (Maryland), the state licensing agency, as required by § 107a(d)(1) of the Act. *See* 20 U.S.C. § 107a(d)(1). Upon learning of the VAMC project, Maryland applied to the DVA for a permit to operate a blind vending facility at the VAMC. The DVA denied Maryland's application, and an arbitration panel, convened pursuant to § 107d-1(b) of the Act, held a hearing to arbitrate the dispute.

On May 5, 1994, the arbitration panel issued a unanimous order finding that the provisions of the Act applied to the VAMC and ordering that the parties enter into negotiations to permit Maryland and its licensed vendor to operate a vending facility at the VAMC. The panel's order provided further that if the parties failed to agree on a permit for the vending facility by June 1, 1994, each party should submit a proposed permit before June 15, 1994, and the permit preferred by a majority of the panel would become the final award of the panel.

On June 15, 1994, Maryland submitted a proposed permit to the panel. Although the DVA did not submit a proposed permit, it filed a motion seeking reconsideration of the panel's decision.

On October 15, 1994, the arbitration panel issued its final order in which it directed the DVA to turn over to

Maryland the operation of the retail store already located at the VAMC, then operated by the DVA in accordance with the Veterans' Canteen Service Act, 38 U.S.C. §§ 7801-7810.[2] In addition to the retail store space, the arbitration panel also ordered that the DVA turn over certain fixtures and equipment.

Maryland filed this action in the United States District Court for the District of Maryland in response to the DVA's continued refusal to comply with the arbitration panel's award. In its Amended Complaint, Maryland sought an order from the district court requiring the DVA to comply with the arbitration panel's award or, alternatively, an order requiring the DVA to comply with the Act by providing a satisfactory site for a blind vendor's facility at the VAMC. On May 31, 1995, the DVA issued a final order with respect to its responsibilities under the Act and offered three specific sites within the VAMC which the DVA deemed satisfactory under the Act for the operation of a blind vending facility. Maryland rejected each of these sites as unsatisfactory. Both parties moved for summary judgment, and on August 17, 1995, the district court entered judgment for the DVA. *Maryland State Dep't of Educ. v.*

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[2]The Veterans' Canteen Service Act (VCS), 38 U.S.C. §§ 7801-7810, was created for the purpose of making essential merchandise and services available to veterans hospitalized or domiciled at DVA hospitals at reasonable prices. 38 U.S.C. § 7801. Pursuant to the VCS, retail stores and canteens are operated by the DVA at its hospitals where deemed "necessary and practicable." *Id.* § 7802(1). The DVA initially argued before the district court that the arbitration panel's decision in this case was not enforceable because the Randolph-Sheppard Act did not apply to DVA facilities as contrary to the VCS. The DVA has since abandoned this argument, however, and now concedes that the terms of the Act are applicable to DVA facilities.

United States Dep't of Veterans Affairs, 896 F.Supp. 513 (D. Md. 1995). The district court held that the arbitration panel had exceeded its authority under the Act when it ordered a specific remedy and denied Maryland's request for relief. Maryland noted a timely appeal.

II.

On appeal, Maryland argues that the district court erred when it declined to enforce the arbitration panel's award and entered judgment for the DVA, holding that § 107d-2(b)(2) of the Act does not authorize an arbitration panel, convened under § 107d-1(b) of the Act, to award a specific remedy once a violation of the Act has been found. We disagree and affirm the judgment of the district court in favor of the DVA.

A.

Whether a party is entitled to summary judgment is a matter of law which we review *de novo*. *Higgins v. E.I. DuPont de Nemours and Company*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

B.

Courts are charged with the duty to apply the law that Congress enacted. Therefore, we begin with the language of the statute itself, "bearing in mind that we should give effect to the legislative will as expressed in the

language." *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 954 (1995). Thus, "[c]ourts are not free to read into the language what is not there, but rather should apply the statute as written." *Id.* In other words, if the statutory language "'is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.'" *Id.* (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

There are, however, rare and narrow exceptions under which courts may stray beyond the plain language of unambiguous statutes. *Id.* One such exception arises if the literal application of statutory language would lead to an absurd result. *See Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930). For this exception to apply, however, the absurdity "must be so gross as to shock the general moral or common sense. And, there must be something to make plain [Congress' intent] that the letter of the statute is not to prevail." *Id.* (internal citations omitted).

Another circumstance permitting courts to look beyond the plain meaning of unambiguous statutory language arises if literal application of the statutory language would produce a result demonstrably at odds with the intent of Congress; in such cases, the intent of Congress rather than the strict language controls. *See United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters. In such cases, the intention of the drafters, rather than the strict language controls.") (internal quotation marks and citations omitted). To come within the ambit of this exception, however, the contrary intent must

have been clearly expressed by the legislative body. *See Russello v. United States*, 464 U.S. 16, 20 (1983). In the absence of expressed Congressional intent, we must assume that Congress intended to convey the language's ordinary meaning. *See United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 506 (2d Cir. 1991) ("The words of a statute should be given their normal meaning and effect in absence of showing that some other meaning was intended."); *United States v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989) ("In the absence of a contrary indication, the court must assume the drafters of a statute intended to convey the ordinary meaning attached to the language.").

C.

Applying these rules of statutory construction to the language of § 107d-2(b)(2), we hold that the plain language of § 107d-2(b)(2) limits the authority of an arbitration panel convened under § 107d-1(b) to a determination of whether the acts of the federal entity "are in violation" of the substantive provisions of the Act. *See* 20 U.S.C. § 107d-2(b)(2). Section 107d-2(b)(2) provides, in pertinent part:

> If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency or instrumentality are in violation of this chapter, or any regulation issued thereunder, *the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly* and shall take such other action as may be necessary to carry out the decision of the panel.

Id. (emphasis added). The plain language of this provision provides that a § 107d-1(b) arbitration panel will determine

whether the federal entity is in violation of the Act, while the head of the federal entity will remedy the violation. Thus, the statute places the responsibility for ending the violation on the head of the federal entity and does not authorize a § 107d-1(b) arbitration panel to order the federal entity to take specific remedial action. Since the language of the statute is "facially clear and 'within the constitutional authority of [Congress], the sole function of th[is] court[ ] is to enforce it according to its terms.'" *See Murphy*, 35 F.3d at 145 (quoting *Caminetti*, 242 U.S. at 485).

While the question of the scope of an arbitration panel's authority under § 107d-1(b) is one of first impression in this circuit, in *Georgia Dep't of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990), the Eleventh Circuit discussed the authority of a § 107d-1(b) arbitration panel as set forth in § 107d-2(b)(2). *Id.* at 1491-92. The precise question before the Eleventh Circuit in *Nash* was whether the district court properly interpreted the Act to grant a blind licensee a cause of action for damages against the state licensing agency for the agency's failure to file a complaint against a federal entity under § 107d-1(b). *Id.* at 1483. In holding that the Act does not authorize such a cause of action, the Eleventh Circuit discussed extensively the remedial provisions of the Act and the powers granted thereunder. *See id.* at 1487-95.

In particular, the court examined the differences between the remedial procedures provided under § 107d-1(a) for complaints filed by blind licensees against the state licensing agency and those provided under § 107d-1(b) for complaints filed by the state licensing agency against a federal entity. The court noted differences in the composition of the arbitration panels convened under § 107d-1(a) and § 107d-1(b) and in the remedial powers

granted to those panels. With regard to the powers of an arbitration panel convened under § 107d-1(b), the Eleventh Circuit considered the plain language of § 107d-2(b)(2) and concluded that a panel convened to resolve a dispute between a state licensing agency and a federal entity does not have the authority to order a specific remedy, but rather is limited to a determination of whether the federal entity is in compliance with the terms of the Act:

> [Section 107d-2(b)(2)] specifically grants the arbitration panel in subsection (b) cases authority to decide whether the federal entity's acts "are in violation" of the Act. The provision, however, limits the panel's authority to that decision alone: although the panel may determine that a violation is occurring and may identify the discrete acts that are in violation, the statute does not authorize the arbitration panel to order the federal entity to take any remedial action. Rather, the statute expressly places the obligation of ending the violation on the federal entity itself.

Id. at 1492. The Eleventh Circuit contrasted the language placing express limits on a § 107d-1(b) arbitration panel with the absence of such language limiting the authority of a § 107d-1(b) arbitration panel.

As support for its assertion that the plain language of § 107d-2(b)(2) does not limited the remedial powers of a § 107d-1(b) arbitration panel, Maryland relies on *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90 (D.C. Cir. 1986). In *Weinberger*, the court quoted from § 107d-2(b)(2) and concluded that "the Secretary of Education has broad remedial powers under the Act." *Id.* at 109. The District of Columbia Circuit, however, did not discuss how it reached its conclusion that the Secretary's

remedial powers under § 107d-2(b)(2) were broad. *See id.* Nor did the court discuss the effect of the "head of any such department" clause, which vests responsibility for "caus[ing] [violative] acts or practices to be terminated promptly" in that individual. *See id.; see also* 20 U.S.C. § 107d-2(b)(2). We believe that our interpretation of § 107d-2(b)(2) gives effect to all of the language of the provision and, therefore, decline to follow the District of Columbia Circuit's interpretation of § 107d-2(b)(2).

Maryland also argues our interpretation cannot be correct because under such an interpretation, a federal entity can simply refuse to remedy the violations found by a § 107d-1(b) panel. As recognized above, the court may look beyond the plain language of the statute, if the literal application of statutory language would lead to an absurd result. *See Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930). However, the absurdity "must be so gross as to shock the general moral or common sense." *Id.*

In this case, the result of our interpretation of § 107d-2(b)(2) is that the DVA is vested with the responsibility to end the acts found in violation of the Act and to take other steps necessary to bring it into compliance. While it may have been wiser for Congress to have provided for an automatic review of the remedial steps taken by a federal entity in response to an arbitration decision, the fact that Maryland is left without such a review is not "so gross as to shock the general moral or common sense." *See id.* In addition, if a state licensing agency is dissatisfied with the response of a federal entity to an arbitration panel's decision, the state agency can file another complaint with the Secretary and have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance

with the Act. Again, this solution may seem cumbersome, but it is not "so gross as to shock the general moral or common sense." *See id.* Therefore, we must adhere to the result dictated by the plain language of the statute.

Finally, Maryland argues that to hold that a § 107d-1(b) arbitration panel does not have the authority to order specific relief contravenes the intent of Congress. In particular, Maryland cites legislative history suggesting that at the time Congress enacted the 1974 Amendments to the Act, which included § 107d, it was concerned with abuses of the program by federal agencies. S. Rep. No. 937, 93d Cong., 2d Sess. 10-11 (1974). As Maryland notes, the legislative history indicates that Congress enacted the remedial provisions of the Act to "provide the means by which aggrieved vendors and State agencies may obtain a final and satisfactory resolution of disputes." *Id.* at 20.

This legislative history does not, however, cast a shadow on our holding or the Eleventh Circuit's interpretation of § 107d-2(b)(2) in *Nash*. While the Senate Report indicates that Congress intended to provide a final resolution of disputes arising from the administration of the Act, it does not clearly express Congress' intent that the resolution of every facet of these disputes -- that is, both the fact of a violation and the appropriate remedy -- should lie with the arbitration panel. As indicated above, we read the plain language of the statute to require that the arbitration panel resolve the dispute as to whether the federal entity in question is in violation of the statute, while the responsibility for correcting the violation lies with the federal entity head. Nothing in the legislative history cited by Maryland suggests that this interpretation will produce a result "demonstrably at odds with the intentions of [the Act's] drafters." *See Ron Pair Enters., Inc.*, 489 U.S. at

242. Therefore, we adhere to the result dictated by the plain language of the statute.

III.

In summary, the arbitrator panel not only determined that the DVA's actions were in violation of the Act, but also ordered the DVA to turn over to Maryland specific space in the VAMC, as well as certain fixtures and equipment. We agree with the district court that by ordering a specific remedy to the violation it found, the arbitration panel exceeded its authority under § 107d-2(b)(2). Therefore, we affirm the district court's grant of summary judgment in favor of the DVA.[3]

AFFIRMED

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[3] Because we are affirming the judgment of the district court on the basis that the arbitration panel exceeded its authority under § 107d-2(b)(2), we need not address the DVA's alternative argument that enforcement of the panel's award would usurp the DVA's statutory authority under the VCS.

FILED: December 31, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2626
(CA-95-8-K)

MARYLAND STATE DEPARTMENT OF EDUCATION, Division of Rehabilitation Services,

Plaintiff - Appellant,

NATIONAL FEDERATION OF THE BLIND,

Amicus Curiae - Intervenor,

DONALD J. MORRIS,

Intervenor,

versus

U.S. DEPARTMENT OF VETERANS AFFAIRS; JESSE BROWN, Secretary, Department of Veterans Affairs; JOHN T. FARRAR, Under Secretary for Health, Department of Veterans Affairs; MICHAEL B. PHAUP, Director, Veterans Affairs Medical Center.

Defendants - Appellees.

ORDER

Amicus curiae, National Federation of the Blind, and Donald J. Morris have filed a motion to intervene for the purposes of filing a petition for rehearing with suggestion

for rehearing in banc. Appellant has also filed a petition for rehearing with a suggestion for rehearing in banc.

The Court grants the motion of the National Federation of the Blind and Donald J. Morris for leave to intervene. Appellant's and Intervenors' petitions for rehearing with suggestions for rehearing in banc were submitted to the Court. As no member of this Court or the panel requested a poll on the suggestions for rehearing in banc, and

As the panel considered the petitions for rehearing, it is of the opinion that they should be denied.

IT IS ORDERED that appellant's and intervenors' petitions for rehearing with suggestions for rehearings in banc are denied.

For the Court

/s/ Patricia S. Connor

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES	*	
v.	*	CIVIL NO. K-95-8
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, ET. AL.	*	

Filed: August 17, 1995

J. Joseph Curran, Jr., Esquire, Attorney General of Maryland, Caroline E. Emerson, Esquire, Assistant Attorney General of Maryland, Carmen M. Shepard, Esquire, Assistant Attorney General of Maryland, and Evelyn O. Cannon, Esquire, Assistant Attorney General of Maryland for plaintiff.

Lynn A. Battaglia, Esquire, United States Attorney, and Allen F. Loucks, Esquire, Assistant United States Attorney for the District of Maryland; Sheila Lieber, Esquire and Elise S. Shore, Esquire, United States Department of Justice, Civil Division, Federal Programs Branch; Frank Hunger, Esquire, United States Department of Justice; and Gregory Burke, Office of the General Counsel, United States Department of Veterans Affairs, for defendants.

KAUFMAN, Senior District Judge

This case involves two federal statutes, the Randolph-Sheppard Act, 20 U.S.C. § 107-107f, and the Veterans'

Canteen Service Act, 38 U.S.C. § 7801, et. seq., each of which provides different benefits for different purposes. Plaintiff, Maryland State Department of Education, Division of Rehabilitation Services ("State")[1], initiated this suit under the Randolph-Sheppard Act against defendants, United States Department of Veterans Affairs ("DVA"), Jesse Brown, Secretary of the United States Department of Veterans Affairs ("Secretary"), John T. Farrar, Under-Secretary of the United States Department of Veterans Affairs, and Michael B. Phaup, Director of the Veterans Affairs Medical Center in Baltimore Maryland. Each of the defendants is either a federal government entity or an officer of such entity. Jurisdiction exists pursuant to 28 U.S.C. § § 1331 and 1361.

The Randolph-Sheppard Act ("R-S Act") establishes a cooperative federal/state vocational rehabilitation program to promote economic opportunity and self-sufficiency for blind individuals through the operation of vending facilities on federal property. Under the Act, every building acquired, constructed, substantially altered or renovated by a federal agency after January 1, 1975 must include a satisfactory site for a blind vending facility. In 1987, the DVA began construction of the Veterans Affairs Medical Center ("VAMC") located at 10 North Greene Street, Baltimore, Maryland. DORS, the State licensing agency, charged with implementing the R-S Act in Maryland, was not given notice by the DVA of DVA's plan to construct the VAMC. DORS, after learning of the VAMC project, applied on December 2, 1991, to the DVA for a permit to operate a Randolph-Sheppard vending facility at the VAMC; the DVA denied that request on April 6, 1992. Under the R-S Act, if the state licensing agency (SLA)

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[1] The Division itself is referred to herein as "DORS."

believes that a federal agency is in violation of the Act, the SLA may file a complaint with the Secretary of Education of the United States to convene a panel to arbitrate the dispute. The decision of that panel is binding on the parties.[2]

DORS filed a complaint with the Secretary of Education on June 24, 1992 and requested that the dispute with the DVA be arbitrated. An arbitration panel held a hearing on July 19, 1993 and both parties presented evidence. The parties also submitted post-hearing briefs. Defendants argued that the separate duties, imposed on the DVA by the Veterans' Canteen Service Act ("VCS"), exempted the defendants from the requirement of the R-S Act. Furthermore, defendants argued that no space was available at the VAMC to provide a blind vending facility. Plaintiffs contended that the R-S Act was applicable to the DVA and must be enforced. On May 5, 1994, the arbitration panel issued a unanimous opinion that the R-S Act applied to the VAMC and that the VCS did not exempt the VAMC from the R-S Act's requirements. The panel ordered the parties to enter into negotiations to devise a solution to allow DORS and its licensed vendor to operate a vending facility at the VAMC. The arbitration panel's Order also provided, at page 8 of the May 5, 1994 opinion, that "[i]f no permit is agreed upon by June 1, 1994, then each party shall submit a proposed permit to this panel on or before June 15, 1994, and the proposed permit preferred by a majority of the arbitration panel shall become the final award of the panel." Despite the Order of the arbitration panel, the DVA did not

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[2] See 20 U.S.C. §107d-1(b).

enter into negotiations with DORS.[3] DORS submitted to the panel on June 15, 1994, a proposed permit; the DVA did not submit a proposed permit. On October 15, 1994, the arbitration panel issued a final Order which required the DVA to "turn over the operation of the retail store at VAMC Baltimore . . . effective January 1, 1995."[4] That retail store, specifically referred to in the arbitration panel's Order, is a store currently operated under the provisions of the VCS. The October 15, 1994 Order of the panel also included a requirement that the DVA turn over certain fixtures and equipment in addition to the retail store space. As of the date of the filing of the within opinion, the DVA has not complied with the arbitration panel's Order.

Plaintiff brought this action seeking, as its primary form of relief, an Order from this Court requiring the DVA to comply with the arbitration panel's award, namely that the retail store at the VAMC and the fixtures within the store be turned over to the State for the operation of a blind vendor space. In its initial complaint, the State sought its remedy via motions for a preliminary injunction and summary judgment. At the suggestion of this Court, the State amended its complaint, seeking on a secondary basis, as an alternative to such primary relief, i.e. the enforcement of the arbitration award, a secondary form of relief, i.e. that this

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[3] In its answer, defendants note that while they did not enter into negotiations, they did file a motion asking the arbitration panel to reconsider its decision. See Defendants' answer to first amended complaint at ¶ 22. The panel has not altered its Order.

[4] See Plaintiff's first amended complaint at ¶ 25.

Court require defendants to comply with the R-S Act.[5] In seeking this secondary form of relief, the State set forth, inter alia, specific requirements with regard to size of space and location of space which the State contends are required by the R-S Act.[6] Defendants moved to dismiss, or in the alternative, for summary judgment, arguing that under the R-S Act, only the Secretary has the authority to remedy any violation of the R-S Act.

This Court, beginning in April, 1994, held a series of lengthy on-the-record and off-the-record telephone conferences and in-chambers conferences with counsel on both sides in an effort to resolve the within case in a mutually agreeable manner. In some respects, counsel were able to work together to resolve their differences. While the DVA initially argued that the R-S Act was inapplicable,[7] and argued that the doctrine of laches prevented the plaintiff from bringing the within suit, the DVA dropped those positions, ceased to advocate them, and offered specific space at the VAMC to the plaintiff for a blind vending facility. When the State objected to that proposed space, the DVA offered alternative sites which were later embodied, as alternative spaces, in a final Order of the Secretary, dated June 1, 1995. Also, the State

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[5] See Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief at page 8-9.

[6] As discussed infra, several central questions of fact which remain before this Court relate to the issues of size and location of space -- specifically what is the amount of space at the VAMC, and what is appropriate specific space within the VAMC, needed to comply with the R-S Act.

[7] In this Court's view, it is clear that the R-S Act is applicable.

acknowledged that the arbitration panel exceeded its authority when it Ordered the DVA to turn over certain fixtures and equipment in addition to the retail store space.

However, in the end, settlement discussions were not successful. At the heart of the dispute lie factual disputes with regard to the amount of space and the location of space. In that regard, the State has rejected each and all of the sites proposed by the DVA and later embodied in the Secretary's June 1, 1995 Order. Instead, the State, while primarily seeking enforcement of the arbitration panel's Order, asked, on a secondary basis, that a conference room located on the second floor of the VAMC be designated as the blind vendor facility. The DVA has rejected that proposal.

I

Under § 706 of the Administrative Procedure Act ("APA"), the decision of a federal agency official such as the Secretary is reviewed under an arbitrary and/or capricious standard. However, because the record does not include any factual and/or legal development by the arbitration panel or by the Secretary with regard to the requirements of the R-S Act concerning size and/or location of space, this Court raised the possibility that this Court might hold an evidentiary hearing, under Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) and its progeny in order to receive evidence concerning such matters. Under Overton Park "there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." Id. at 415. Such a hearing was in fact once scheduled to take place in June, 1995. However, the State objected to a such procedure, stating

that this Court should not hold a hearing, but rather, that the arbitration panel should hold the evidentiary hearing.[8] Defendants did not seek or oppose any such hearing. While this Court believes that it possesses discretionary authority to hold a hearing under the standards of Overton Park -- whether or not the State so agrees -- this Court cancelled the hearing because of the State's position. However, this Court, in a Memorandum and Order dated June 19, 1995, provided to the State the opportunity to seek to have the case remanded to the arbitration panel. The State, however, also rejected that option.[9] This Court, in a Memorandum and Order dated July 7, 1995, provided plaintiff with yet another option -- to seek a remand to the Secretary so that the Secretary could make findings of fact and conclusions of law with a review available by this Court under § 706 of the APA after the Secretary so acted. If plaintiff desired such a remand, it was required to so request on or before July 21, 1995. Plaintiff has not so requested.

In the amended complaint, the State specifically requests that the space to be designated "consist of at least 700 square feet, including space for storage" and that the space "be directly accessible from a corridor used for pedestrian traffic so as to provide access by potential customers." First Amended Complaint at pages 8-9. It is undisputed that the spaces embodied in the Secretary's June 1, 1995 Order consist of less than 700 square feet. Additionally, it is also undisputed that the larger of the spaces offered to the State at the VAMC is not on a pedestrian corridor. What is disputed, however, and thus, what this Court cannot decide

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[8] See Plaintiff's supplemental brief dated May 31, 1995.

[9] See Plaintiff's Response to Court's June 19 Memorandum and Order dated June 28, 1995.

in the light of the current record, is whether the amount of space for a blind vendor facility should, in order to meet the requirements of the R-S Act and of applicable regulations under that statute, consist of at least 700 square fee and/or whether any such facility must be located on a main pedestrian corridor.

In challenging the Secretary's June 1, 1995 Order, the State poses various issues of relevant and material disputed fact. For example, the State refers to the DVA's contention that it cannot relocate the conference room without harming the medical and educational missions of the VAMC.[10] Additionally, the State states that its decision to reject the proposed sites was "predominantly" due to size and/or location of space.[11] In that regard, the State contends that because one of the areas of space, designated by the Secretary's June 1, 1995 Order, encompasses only 570 square feet and is located adjacent to the cafeteria, the designation of such space by the Secretary is not in compliance with the R-S Act. The State also argues that "square footage alone does not determine whether a proposed blind vending facility will be viable . . . Additional critical factors . . . includ[ing] location, . . . visibility, . . . overall size and layout of the facilities . . . [effect the viability of a facility]."[12] Further, the State asserts that, in other instances, there have been agreements between blind vendors and other vendors voluntarily to limit product lines to minimize head-to-head competition.

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[10] See Affidavit of Scott Dennis, Director of the Maryland Blind Vending Program at ¶ 8.

[11] Id. at ¶ ¶ 5-6.

[12] Id. at ¶ 3.

Because the DVA, in this instance, has refused so to agree, the State argues that the location of space is that much more important.[13] The DVA, however, contends that the R-S Act requires only a minimum amount of space of 250 square feet, see 34 C.F.R. § 395.1(q), and that the R-S Act is silent concerning location of space. Thus, in the view of the DVA, it has met the R-S Act's minimum requirements int he Secretary's alternative designations of space in his June 1, 1995 Order.

The Secretary's said Order simply describes the amount of space and location of space. It does not address any of the various items of factual and/or legal dispute discussed supra. In that context, this Court offered options to the parties so as to permit the development of an amplified factual record which would permit this Court, as the present record does not, to determine whether the Secretary has, in his June 1, 1995 Order, acted arbitrarily, or otherwise than in accordance with the R-S Act.

II

When this Court first conferred with counsel in April, 1995, as well as at numerous other times thereafter, this Court consistently expressed the view that the State would likely, in this Court's view, not succeed in connection with its primary quest to have this Court enforce the arbitration panel's award. Therefore, this Court encouraged plaintiff to seek alternative relief.[14]

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[13] Id. at ¶ 7.

[14] In its May 19, 1995 filing, the State moved for this Court to certify this case for immediate interlocutory appeal to the Fourth Circuit from this Court's expected decision with

The R-S Act provides that it is the duty of the agency head to remedy any violation of the Act.

> If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

20 U.S.C. § 107d-2(b)(2). The statute also provides that the arbitration panel will review the agency action and determine if that action violates the Act. However, under the statute, it is the role of the agency head, in this case the Secretary of Veterans Affairs, to remedy any violation of the Act.

It is in that context that this Court finds itself in agreement with Chief Judge Tjoflat's view that "[t]he subsection (b) panel . . . under the Act's express terms, has no remedial powers whatsoever. It may determine that certain of the federal entity's acts violate the Act, but the Act leaves responsibility for remedying the violation to the federal entity itself." Georgia Dep't of Human Resources v. Nash, 915 F.2d 1482, 1492 (11th Cir. 1990). See also United States v. Mississippi Vocational Rehabilitation for

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regard to the denial of the primary relief sought. This Court rejected that said request, and instead encouraged the State to seek alternative relief by one of the procedures discussed supra with an eye to achieving prompt designation of appropriate space at the VAMC for use by the blind vendors. The State, however, has decided not to avail itself of any of those options.

the Blind, 794 F.Supp. 1344, 1352 (S.D. Miss. 1992). In the within case, it is undisputed that the arbitration panel, in issuing its final decision, did fashion a specific remedy. Therefore, under Nash, the arbitration panel exceeded its authority.

The State argues that the R-S Act creates a priority over the Veterans' Canteen Service Act and that, on that basis, the arbitration panel's award should be enforced. In essence, the State seems to contend that Congress created two statutes designed to aid two distinct groups of people and that the R-S Act trumps the Veterans' legislation. As this Court concludes that the arbitration panel exceeded its authority in designating the remedy, this Court need not reach the question of whether one statute has priority, in whole or in part, over the other. The State, as is its right, has repeatedly disagreed with and objected to this Court's reliance on Nash, arguing that the R-S Act allows the arbitration panel to remedy the agency's violation. Plaintiff's view in that regard is once again rejected by this Court. There remains before this Court the question of whether this Court should grant plaintiff's secondary quest for relief, namely that this Court exercise its equity powers and order the Secretary to comply with the R-S Act and determine whether the Secretary's June 1, 1995 Order designating certain alternative spaces violates the R-S Act or any rules and/or regulations thereunder.

The State has pointed out in one or more filings that the State is not seeking, in connection with its secondary quest for relief from this Court, any review under the APA. The State has also stated, as this Court noted in paragraph (6) of its July 7, 1995 Memorandum and Order in this case, that the Secretary apparently cannot seek review of his own decision under the APA. Were this Court required to reach

the APA issue, which -- as discussed infra, it will not -- this Court would find that the State has not established (a) that the Secretary has acted in an "arbitrary or capricious" manner or (b) that the Secretary's June 1, 1995 Order otherwise violates § 706 of the APA.

In that regard, the question arises as to whether, with an avenue of relief seemingly available to the State under the APA, this Court should exercise any of its equity powers. In this instance, this Court need not reach that question, nor whether this Court should presently act in a review capacity under the APA, because whether this Court proceeds under the APA or under its equity powers, this court runs into the same problems, namely that there exist relevant and material issues of disputed fact concerning whether the Secretary's June 1, 1995 Order lacks a "rational basis" or that the Secretary's actions in issuing that Order were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under the standards of the APA, it is the plaintiff's burden, under § 706, to show that agency action is not valid. When applying the arbitrary and capricious standard, this Court must consider whether the Secretary has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). This Court seemingly should apply the same standards if it were to act

under its equity powers to require the Secretary to comply with the R-S Act.[15]

The existing record now before this Court discloses the DVA's offers of space during settlement discussions which were later embodied in the Secretary's June 1, 1995 Order. A review of that record does not disclose that the Secretary of the DVA failed to "conduct . . . a reasoned evaluation of the relevant information" or that the Secretary has "reached a decision that, although perhaps disputable, was . . . 'arbitrary or capricious.'" Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 385 (1989). It may be, however, that the Secretary did, as the State contends, violate certain requirements of the R-S Act in entering its June 1, 1995 Order as, for example, in the selection of specific alternative locations and/or the size and/or location of the same. But, as of this date, in the context of the present record, the State has not so shown. Thus the State is not entitled to have this Court exercise its equity power to order the Secretary to do anything the Secretary has not done to date.

III

If the judgment entered in this case becomes final, the State will have available to it the options set forth in the Secretary's June 1, 1995 Order, but will have lost the opportunity to have this Court determine whether or not the

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[15] That is so because the only basis for this Court to take action to require the Secretary to act otherwise than in accordance with his June 1, 1995, Order, would be that the Secretary has acted arbitrarily, capriciously or unlawfully. That is the same standard pursuant to which the Secretary's said Order could be successfully challenged by the State pursuant to § 706.

Secretary acted arbitrarily, capriciously or unlawfully in issuing that Order. On its face, in this Court's view, that Order is entirely valid. The burden is on the State to show that the Secretary's Order is arbitrary, capricious, or unlawful. That the State cannot achieve under the existing record, and has declined to opportunity to have this Court, or the Secretary, or the arbitration panel conduct further proceedings in which further findings of fact and determinations of law could be forthcoming. That, in this Court's view, is regrettable, but it accords with the actions of the State in the proceedings in this case before this Court.

IV

For the reasons stated in the within opinion, plaintiff's quest for its primary form of relief, namely that this Court enforce the arbitration panel's order, will be denied in an Order of even date herewith, and plaintiff's quest that this Court, on a secondary basis, exercise its equity powers and direct the Secretary to comply with the R-S Act as specified by the State in the first amended complaint, will also be so denied. Accordingly, in that said Order, judgment will be entered for defendants.

/s/

Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES	*	
v.	*	CIVIL NO. K-95-8
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, ET. AL.	*	

ORDER

(1) All relief sought by plaintiff in this case is hereby denied and judgment is hereby entered for defendants.

(2) It is so ordered, this 17th day of August, 1995.

/s/

Senior United States District Judge

BEFORE THE
UNITED STATES DEPARTMENT OF EDUCATION

In the Matter of Arbitration Between	:	
MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF VOCATIONAL REHABILITATION,	:	
Petitioner,	:	Case No. R-S/92-11
and	:	
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,	:	
Respondent.	:	

* * * * * * * * * * *

OPINION OF THE ARBITRATION PANEL

Issue

This case involves the interplay of two statutes: the Randolph-Sheppard Act, 20 U.S.C. § 107 et seq., and the law governing the operation of Veterans Affairs Medical Centers, specifically 38 U.S. C. § 8110(c). It presents the question of whether Section 8110(c) preempts the Randolph-Sheppard Act's mandate that blind vendors be given a priority to operate vending facilities in federal buildings.

Background

In August 1987, the Department of Veterans Affairs ("VA") began construction of a new Veterans Affairs Medical Center ("VAMC") at 10 N. Greene Street, Baltimore, Maryland. Space allocation in the building was completed in 1985, and final design was completed in 1989. The building's construction was completed in July 1992, and the VA occupied the building in January 1993.

Prior to 1993, the VA operated a VA medical center at 3900 Loch Raven Boulevard in Baltimore. The new facility is two-and-a-half times larger than the old facility. The new facility has a substantially larger staff and treats substantially more patients than the old facility. It has a retail store that is almost twice the size of the retail store at the old facility (slightly under 1,000 square feet versus approximately 500 square feet), in order to accommodate the larger demand at the new facility. This retail store, together with a cafeteria and vending machines at the medical center, are operated by the Veterans' Canteen Service ("VCS"). The VCS hired approximately 13 new employees for the new facility.

The Maryland State Department of Education, Division of Rehabilitation Services ("DVR"), is the State licensing agency ("SLA") designated to administer the Randolph-Sheppard vending program in Maryland.

By letter of December 2, 1991, DVR applied to the VA for a permit to operate a Randolph-Sheppard vending facility at the VAMC Baltimore. Following two additional inquiries from DVR, the VA responded by letter of April 6, 1992, denying the request for a permit.

On June 24, 1992, DVR filed a Complaint with the Secretary of Education requesting arbitration and an award of a vending facility permit pursuant to the Randolph-Sheppard Act.

On July 19, 1993, this panel held a full-day hearing at which both parties presented evidence. Both parties subsequently submitted post-hearing briefs, and the case is now ripe for decision.

Discussion

Congress enacted, and subsequently strengthened, the Randolph-Sheppard Act in order to promote employment opportunities for the blind by providing blind vendors with a priority to operate vending facilities at any federal properties. 20 U.S.C. § 107(a).

The Randolph-Sheppard Act's plain language provides that it applies to any and all federal departments, agencies, and instrumentalities in control of any federal property, 20 U.S.C. §§ 107(a), 107(b)(2), 107e(3); Minnesota v. Riley, 1994 U.S. App. Lexis 4339, at *5 (8th Cir. Mar. 11, 1994), and (with certain exceptions not applicable here) it specifically requires that, after January 1975, no such federal body shall occupy any building that lacks a satisfactory site for a vending facility. 20 U.S.C. § 107a(d).

The Randolph-Sheppard Act and its implementing regulations establish a system under which the Secretary of Education promulgates and administers uniform procedures for the establishment of Randolph-Sheppard vending facilities. 20 U.S.C. § 107(b). It contains an "escape clause" allowing limitations on the placement of vending

facilities, but only if the Secretary of Education specifically finds that the absence of such limitation would adversely affect the interests of the United States. 20 U.S.C. § 107(b). The VA has not applied for an exemption from any of the requirements of the Randolph-Sheppard Act.

The VA's defense to its refusal to issue a permit under the Randolph-Sheppard Act is based primarily on 38 U.S.C. § 8110(c) ("Section 8110(c)"). That statute provides in pertinent part:

> (1) Notwithstanding any other provision of law but except as provided in paragraph (3) of this subsection --
>
> (A) a contract may not be entered into as a result of which an activity at a health-care facility over which the Secretary has direct jurisdiction (hereinafter in this subsection referred to as a "Department health-care facility") would be converted from an activity performed by Federal employees to an activity performed by employees of a contractor of the Government unless the Under Secretary for Health has determined that such activity is not a direct patient care activity or an activity incident to direct patient care . . . .

The VA contends that Section 8110(c) gives it the exclusive right to determine whether an activity at a VA medical facility will be performed, in whole or in part, by federal or non-federal personnel. This argument fails for several separate reasons. First, as the Eight Circuit recently held, "Congress's intent to apply the Randolph Sheppard Act to the VCS is clear from the plain language of the Act . . . . Contrary to the VCS's claim, it is entirely possible for the Randolph Sheppard Act and the Veteran's

Canteen Act to co-exist in harmony." Minnesota v. Riley at *7-8. Second, Section 8110(c) was intended to limit contracting-out of services directly related to patient care, not to preclude the issuance of permits for Randolph-Sheppard vending facilities. Finally, because VAMC Baltimore is a new facility, substantially larger than the previous local facility, the VA could have awarded a permit to the SLA that would not have resulted in any activities being "converted from an activity performed by Federal employees . . . ." Each of these reasons will be briefly discussed in turn.

There is no doubt that Congress intended the Randolph-Sheppard Act to apply to VA Medical Centers. As noted above, the statute specifically refers to property owned or occupied by any "federal department, agency, or instrumentality." Moreover, Congress specifically considered the special requirements of the VCS and decided to exempt it from only one aspect of the Act's operation, regarding the sharing of vending machine income. 20 U.S.C. § 107d-3(d). As the United States District Court for Minnesota observed,

> . . . Congress considered the VCS's need for vending machine revenues, balanced that need with the purposes of the blind vending program, and struck a compromise. The fact that the Congress specifically addressed VCS's needs in amending the Randolph-Sheppard Act indicates a congressional intent to subject the VCS to the Randolph-Sheppard Act; thus, to the extent that its provisions conflict with those of the Veteran's Canteen Service Act, the provisions of the Randolph-Sheppard Act must prevail.

Minnesota v. Alexander, No. 4-91-815, slip op. at 29 (D. Minn. Oct. 13, 1992), aff'd sub nom. Minnesota v. Riley, 1994 U.S. App. Lexis 4339 (8th Cir. 1994).

As the Eight Circuit noted, Randolph-Sheppard facilities and the Veterans Canteen Service can co-exist in harmony. The VCS can continue to operate the cafeteria and vending machines at VAMC Baltimore while a blind vendor licensed by the SLA operates the retail store. It may also negotiate many terms of the permit to meet the needs of its medical center patients, 34 C.F.R. § 395.35(c)(3), and, if it believes that more is needed, it may seek further limitations on the permit from the Secretary of Education under 20 U.S.C. § 107(b). Minnesota v. Riley at *9.

Congress does not appear to have intended that Section 8110(c) would affect the Randolph-Sheppard Act in any way. Unlike the Randolph-Sheppard Act Amendments of 1974 (Pub. L. No. 93-516), which specifically considered vending facilities at veterans' hospitals, neither the Veterans' Compensation, Education, and Employment Amendments of 1982 (Pub. L. No. 97-306, which included the section codified as Section 8110(c)) nor its legislative history make any reference to blind vending facilities. It is not at all clear that Section 8110(c)'s references to "direct patient care activity or an activity incident to direct patient care" or to activities being "performed by a contractor of the Government" were intended to apply to retail sales by a blind vendor licensed by an SLA pursuant to a statutorily required permit under the Randolph-Sheppard Act. The legislative history of that section indicates that its purpose was to respond to Office of Management and Budget Circular A-76 regarding contracting-out, not to change the Randolph-Sheppard Act's requirements. Senate Report No. 97-550, 97th Cong., 2d Sess. 20, 99-101 (1982), reprinted

in 1982 U.S.C.C.A.N. 2882-83, 2950-52; Explanatory Statement of Compromise Agreement, reprinted in 1982 U.S.C.C.A.N. 3029-31. In light of the ambiguity in the statutory language, the legislative history's explanation of the purpose of the amendment as having nothing to do with the Randolph-Sheppard Act, and the ability to harmonize the two statutes, it would be inappropriate to read Section 8110(c) as implicitly repealing a portion of the Randolph-Sheppard Act.

Finally, even if Section 8110(c) does generally preclude the conversion of the operation of retail stores from the VCS to Randolph-Sheppard vendors, no such conversion would have occurred if the VA had complied with the Randolph-Sheppard Act and established a Randolph-Sheppard vending facility at the new VAMC Baltimore. The new medical center is far larger than the old, with a far larger population. Even if the old medical center's retail store had been transferred intact, there was ample demand to support an additional store operated by a blind vendor. It is now a moot point, however, because (according to the VA) the medical center's design will not allow a second store.

For all of these reasons, we conclude that the Randolph-Sheppard Act applies to Veterans Affairs Medical Centers and that Section 8110(c) does not exempt VAMC Baltimore from the Randolph-Sheppard Act's requirements.

Minnesota v. Riley is now controlling and sets out the framework for terms and conditions of a permit at a Veterans Affair Medical Center under the Randolph-Sheppard Act. It specifically allows for negotiations between the parties and provides clear and adequate guidelines.

Award

Accordingly, it is the unanimous award of the arbitration panel that the parties hereto shall enter into negotiations leading to a permit that will allow the SLA and its licensed blind vendor or vendors to operate the retail store at VAMC Baltimore. The terms of the permit shall conform to the requirements of 34 C.F.R. § 395.35. The parties shall be guided by the provisions set forth in the final paragraph of Minnesota v. Riley.

If the parties agree upon a permit on or before June 1, 1994, they shall immediately advise the arbitration panel of its terms and conditions, and that permit shall become the final award of the panel. If no permit is agreed upon by June 1, 1994, then each party shall submit a proposed permit to this panel on or before June 15, 1994, and the proposed permit preferred by a majority of the arbitration panel shall become the final award of the panel.

/s/

May 5, 1994

HAROLD D. JONES, JR., Chairperson

/s/

RUSSELL M. PAQUETTE

/s/

ANDREW D. FREEMAN

BEFORE THE
UNITED STATES DEPARTMENT OF EDUCATION

In the Matter of Arbitration :
Between :

MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF VOCATIONAL REHABILITATION, :

Petitioner, : Case No. R-S/92-11

and :

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, :

Respondent. :

* * * * * * * * * * * *

FINAL AWARD

In accordance with the Panel's Opinion and Award of May 5, 1994, it is hereby ORDERED that:

1. Respondent's Motion for Reconsideration is DENIED:

2. The Permit submitted by the Maryland State Department of Education, Division of Vocational Rehabilitation to this Panel on June 8, 1994, shall govern the operations of a Randolph-Sheppard vending facility at the Veterans Affairs Medical Center in Baltimore;

3. On or before October 20, 1994, the United States Department of Veterans Affairs shall provide a description of the space now used for the retail store and associated storage and office space at VAMC Baltimore, to be included as Attachment B to the Permit, and a list of equipment or fixtures now in that space, to be included as Attachment D to the Permit; and

4. The Department of Veterans Affairs shall turn over the operation of the retail store at VAMC Baltimore to the Maryland State Department of Education, Division of Rehabilitation Services effective January 1, 1995, or such other date as the parties may agree upon.

/s/

Date: October 15, 1994

HAROLD D. JONES, JR.,
Chairperson

/s/

Concur:

ANDREW D. FREEMAN

BEFORE THE
UNITED STATES DEPARTMENT OF EDUCATION

In the Matter of Arbitration Between	:	
MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF VOCATIONAL REHABILITATION,	:	
Petitioner,	:	CASE NO. R-S/92-11
and	:	
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,	:	
Respondent.	:	

DISSENTING OPINION

I have fully considered the arguments and briefs submitted by both parties, including the applicable laws and regulations. I would refer specifically to the Motion for Reconsideration filed by the Respondent on June 15, 1994, and the Reply filed by the Petitioner dated June 21, 1994.

The Motion referred to is an in depth analysis of Title 38 United States Code §§ 8110 (C) (1) (A) and 8110 (C) (1) (B). In my opinion, the Sections noted above are applicable and controlling and I adopt and include in this opinion and award all of the arguments set forth in Respondent's Motion of June 15, 1994.

It is my conclusion, therefore, that no permit should be issued to provide the State with vending facilities at the Veterans Affairs Medical Center in Baltimore, Maryland, and space, therefore, is hereby denied.

/s/

RUSSELL M. PAQUETTE

DATED: 8/17/94

Background

The complainant, Maryland State Department of Education, Division of Vocational Rehabilitation, is the State licensing agency (SLA) for the Randolph-Sheppard vending program in Maryland. The respondent, United States Department of Veterans Affairs (VA), began construction of a new Veterans Affairs Medical Center (VAMC) in Baltimore, Maryland, in August 1987 and occupied the building in January 1993. Prior to 1993, the VA operated an older, smaller medical center in Baltimore, that did not contain a Randolph-Sheppard vending facility.

On December 2, 1991, the SLA applied to the VA for a permit to operate a Randolph-Sheppard vending facility at the new VAMC Baltimore. Following two additional inquiries, the VA denied the request on April 6, 1992.

On June 24, 1992, the SLA filed a Complaint with the U.S. Department of Education, requesting arbitration and an award of a vending facility permit at VAMC Baltimore. The arbitration panel was convened and a hearing was held in Baltimore, Maryland, on July 19, 1993.

Arbitration Panel Decision

The arbitration panel ruled that the Randolph-Sheppard Act applies to all federal properties and agencies, including Veterans Affairs Medical Centers, and requires that the VA issue a vending facility permit for the SLA and its licensed blind vendor to operate the retail store at VAMC Baltimore.

The panel held that the plain language of the Randolph-Sheppard Act provides that it applies to all federal departments, agencies, and instrumentalities in control of any federal property, and thus applies to the VA.

The panel rejected the VA's argument that a provision of the law governing Veterans Affairs Medical Centers (Section 8110(c)) exempts those facilities from the Randolph-Sheppard Act. It held that Congress, in amending the Randolph-Sheppard Act in 1974, explicitly considered Veterans Affairs Medical Centers and intended the Act to apply to them. It further held that Section 8110(c) was not intended to preclude the issuance of permits for Randolph-Sheppard vending facilities, and that even if that section did apply to other VA Medical Centers, it did not apply in this case because the new, larger medical center provided an opportunity for a new vending facility without converting from federal to non-federal employees. The panel concluded that the Eighth Circuit's decision in Minnesota v. Riley provided the framework for terms and conditions of a permit at Veterans Affairs Medical Centers.

After the VA failed to submit a proposed permit as requested by the panel, and instead filed a Motion for Reconsideration, a majority of the panel denied the Motion for Reconsideration and ordered that the SLA shall operate the retail store at VAMC Baltimore, pursuant to a permit proposed by the SLA.

The panel member selected by the respondent, after joining in the opinion of the panel, dissented from the denial of the Motion for Reconsideration and from the Final Award. Upon reconsideration, he would have held that Section 8110(c) exempted the VAMC from the Randolph-Sheppard Act.

20 U.S.C. § 107 - 107f

§ 107. Operation of vending facilities

(a) Authorization

For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

(b) Preferences regulations; justification for limitation on operation

In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and the Secretary, through the Commissioner, shall, after consultation with the Administrator of General Services and other heads of departments, agencies, or instrumentalities of the United States in control of the maintenance, operation, and protection of Federal property, prescribe regulations designed to assure that-

(1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 107d-3 of this title to achieve and protect such priority), and

(2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States.

Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register.

§ 107a. Federal and State responsibilities

(a) Functions of the Secretary; surveys; designation of State licensing agencies; qualifications for license; evaluation of programs

The Secretary of Education shall-

(1) Insure that the Rehabilitation Services Administration is the principal agency for carrying out this chapter; and the Commissioner shall, within one hundred and eighty days after enactment of the Randolph-Sheppard Act Amendments of 1974, establish requirements for the uniform application of this chapter by each State agency designated under paragraph (5) of this subsection, including appropriate accounting procedures, policies on the selection and establishment of new vending facilities, distribution of income to blind vendors, and the use and control of set-aside funds under section 107b(3) of this title;

(2) Through the Commissioner, make annual surveys of concession vending opportunities for blind persons on Federal and other property in the United States, particularly with respect to Federal property

under the control of the General Services Administration, the Department of Defense, and the United States Postal Service;

(3) Make surveys throughout the United States of industries with a view to obtaining information that will assist blind persons to obtain employment;

(4) Make available to the public, and especially to persons and organizations engaged in work for the blind, information obtained as a result of such surveys;

(5) Designate as provided in section 107b of this title the State agency for the blind in each State, or, in any State in which there is no such agency, some other public agency to issue licenses to blind persons who are citizens of the United States for the operating of vending facilities on Federal and other property in such State for the vending of newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws, as determined by the State licensing agency, and including the vending or exchange of chances for any lottery authorized by State law and conducted by an agency of a State; and

(6) Through the Commission,[1] (A) conduct periodic evaluations of the program authorized by this chapter, including upward mobility and other training required by section 107d-4 of this title, and annually submit to the appropriate committees of Congress a report based on such evaluations, and (B) take such other steps, including the issuance of such rules and regulations, as may be necessary or desirable in

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[1]So in original. Probably should be "Commissioner".

carrying out the provisions of this chapter.

(b) Duty of State licensing agencies to prefer blind

The State licensing agency shall, in issuing each such license for the operation of a vending facility, give preference to blind persons who are in need of employment. Each such license shall be issued for an indefinite period but may be terminated by the State licensing agency if it is satisfied that the facility is not being operated in accordance with the rules and regulations prescribed by such licensing agency. Such licenses shall be issued only to applicants who are blind within the meaning of section 107e of this title.

(c) Selection of location and type of facility

The State licensing agency designated by the Secretary is authorized, with the approval of the head of the department or agency in control of the maintenance, operation, and protection of the Federal property on which the facility is to be located but subject to regulations prescribed pursuant to section 107 of this title, to select a location for such facility and the type of facility to be provided.

(d) Buildings occupied by United States departments, agencies, and instrumentalities required to provide sites for facilities; exceptions

(1) After January 1, 1975, no department, agency, or instrumentality of the United States shall undertake to acquire by ownership, rent, lease, or to otherwise occupy, in whole or in part, any building unless, after consultation with the head of such department, agency, or instrumentality and the State licensing agency, it is

determined by the Secretary that (A) such building includes a satisfactory site or sites for the location and operation of a vending facility by a blind person, or (B) if a building is to be constructed, substantially altered, or renovated, or in the case of a building that is already occupied on such date by such department, agency, or instrumentality, is to be substantially altered or renovated for use by such department, agency, or instrumentality, the design for such construction, substantial alteration, or renovation includes a satisfactory site or sites for the location and operation of a vending facility by a blind person. Each such department, agency, or instrumentality shall provide notice to the appropriate State licensing agency of its plans for occupation, acquisition, renovation, or relocation of a building adequate to permit such State agency to determine whether such building includes a satisfactory site or sites for a vending facility.

(2) The provisions of paragraph (1) shall not apply (A) when the Secretary and the State licensing agency determine that the number of people using the property is or will be insufficient to support a vending facility, or (B) to any privately owned building, any part of which is leased by any department, agency, or instrumentality of the United States and in which, (i) prior to the execution of such lease, the lessor or any of his tenants had in operation a restaurant or other food facility in a part of the building not included in such lease, and (ii) the operation of such a vending facility by a blind person would be in proximate and substantial direct competition with such restaurant or other food facility except that each such department, agency, and instrumentality shall make very effort to lease property in privately owned buildings capable of accommodating a vending facility.

(3) For the purposes of this subsection, the term "satisfactory site" means an area determined by the

Secretary to have sufficient space, electrical and plumbing outlets, and such other facilities as the Secretary may by regulation prescribe, for the location and operation of a vending facility by a blind person.

(e) State licensing agency in States having vocational rehabilitation plans

In any State having an approved plan for vocational rehabilitation pursuant to the Vocational Rehabilitation Act or the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.], the State licensing agency designated under paragraph (5) of subsection (a) of this section shall be the State agency designated under section 101(a)(1)(A) of such Rehabilitation Act of 1973 [29 U.S.C.A. § 721(a)(1)(A)].

§ 107b. Application for designation as State licensing agency; cooperation with Secretary; furnishing initial stock

A State agency for the blind or other State agency desiring to be designated as the licensing agency shall, with the approval of the chief executive of the State, make application to the Secretary and agree-

(1) to cooperate with the Secretary in carrying out the purpose of this chapter;

(2) to provide for each licensed blind person such vending facility equipment, and adequate initial stock of suitable articles to be vended therefrom, as may be necessary: *Provided, however,* That such equipment and stock may be owned by the licensing agency for use of the blind, or by the blind individual to whom the license is issued: *And provided further,* That if ownership of such equipment is vested in the blind licensee, (A) the

State licensing agency shall retain a first option to repurchase such equipment and (B) in the event such individual dies or for any other reason ceases to be a licensee or transfers to another vending facility, ownership of such equipment shall become vested in the State licensing agency (for transfer to a successor licensee) subject to an obligation on the part of the State licensing agency to pay to such individual (or to his estate) the fair value of his interest therein as later determined in accordance with regulations of the State licensing agency and after opportunity for a fair hearing;

(3) that if any funds are set aside, or caused to be set aside, from the net proceeds of the operation of the vending facilities such funds shall be set aside, or caused to be set aside, only to the extent necessary for and may be used only for the purposes of (A) maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities; and (E) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is determined by a majority vote of blind licensees licensed by such State agency, after such agency provides to each such licensee full information on all matters relevant to such proposed program, that funds under this paragraph shall be set aside for such purposes: *Provided, however,* That in no event shall the amount of such funds to be set aside from the net proceeds of any vending facility exceed a reasonable amount which shall be determined by the Secretary;

(4) to make such reports in such form and containing such information as the Secretary may from time to time require and to comply with such provisions as he may from time to time find necessary to assure the correctness and verification of such reports;

(5) to issue such regulations, consistent with the provisions of this chapter, as may be necessary for the operation of this program;

(6) to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title.

§ 107b-1. Access to information with State licensing agencies; election and responsibilities of Committee of Blind Vendors

In addition to other requirements imposed in this title and in this chapter upon State licensing agencies, such agencies shall-

(1) provide to each blind licensee access to all relevant financial data, including quarterly and annual financial reports, on the operation of the State vending facility program;

(2) conduct the biennial election of a Committee of Blind Vendors who shall be fully representative of all blind licensees in the State program,[1] and

(3) insure that such committee's responsibilities include (A) participation, with the State agency, in major administrative decisions and policy and program development, (B) receiving grievances of blind licensees and serving as advocates for such licensees, (C) participation, with the State agency, in the development and administration of a transfer and promotion system for

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[1]So in original. The comma probably should be a semicolon.

blind licensees, (D) participation, with the State agency, in developing training and retraining programs, and (E) sponsorship, with the assistance of the State agency, of meetings and instructional conferences for blind licensees.

§ 107b-2. Omitted

§ 107b-3. Audit of nonappropriated fund activities

The Comptroller General is authorized to conduct regular and periodic audits of all nonappropriated fund activities which receive income from vending machines on Federal property, under such rules and regulations as he may prescribe. In the conduct of such audits he and his duly authorized representatives shall have access to any relevant books, documents, papers, accounts, and records of such activities as he deems necessary.

§ 107c. Repealed, Pub.L. 93-516, Title II, § 205, Dec. 7, 1974, 88 Stat. 1626

§ 107d. Expenditures

(a) Personal services, rent, printing, etc.

The Secretary is authorized to make such expenditures out of any money appropriated therefor (including expenditures for personal services and rent at the seat of government and elsewhere, books of reference and periodicals, for printing and binding, and for traveling expenses) as he may deem necessary to carry out the provisions of this chapter.

(b) Preference to blind persons in employment

The Secretary shall, in employing such additional personnel as may be necessary, give preference to blind persons who are capable of discharging the required duties.

§ 107d-1. Grievances of blind licensees

(a) Hearing and arbitration

Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

(b) Noncompliance by Federal departments and agencies; complaints by State licensing agencies; arbitration

Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder (including a limitation on the placement or operation of a vending facility as described in section 107(b) of this title and the Secretary's determination

thereon) such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

§ 107d-2. Arbitration

(a) Notice and hearing

Upon receipt of a complaint filed under section 107d-1 of this title, the Secretary shall convene an ad hoc arbitration panel as provided in subsection (b) of this section. Such panel shall, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5.

(b) Composition of panel; designation of chairman; termination of violations

(1) The arbitration panel convened by the Secretary to hear grievances of blind licensees shall be composed of three members appointed as follows:

(A) one individual designated by the State licensing agency;

(B) one individual designated by the blind licensee; and

(C) one individual, not employed by the State licensing agency or, where appropriate, its parent agency, who shall serve as chairman, jointly designated by the members appointed under subparagraphs (A)

and (B).

If any party fails to designate a member under subparagraph (1)(A), (B), or (C), the Secretary shall designate such member on behalf of such party.

(2) The arbitration panel convened by the Secretary to hear complaints filed by a State licensing agency shall be composed of three members appointed as follows:

(A) one individual, designated by the State licensing agency;

(B) one individual, designated by the head of the Federal department, agency, or instrumentality controlling the Federal property over which the dispute arose; and

(C) one individual, not employed by the Federal department agency, or instrumentality controlling the Federal property over which the dispute arose, who shall serve as chairman, jointly designated by the members appointed under subparagraphs (A) and (B).

If any party fails to designate a member under subparagraph (2)(A), (B), or (C), the Secretary shall designate such member on behalf of such party. If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

(c) Publication of decisions in Federal Register

The decisions of a panel convened by the Secretary pursuant to this section shall be matters of public record and shall be published in the Federal Register.

(d) Payment of costs by the Secretary

The Secretary shall pay all reasonable costs of arbitration under this section in accordance with a schedule of fees and expenses he shall publish in the Federal Register.

§ 107d-3. Vending machine income

(a) Accrual to blind licensee and alternatively to State agency; ceiling on amount for individual licensee

In accordance with the provisions of subjection (b) of this section, vending machine income obtained from the operation of vending machines on Federal property shall accrue (1) to the blind licensee operating a vending facility on such property, or (2) in the event there is no blind licensee operating such facility on such property, to the State agency in whose State the Federal property is located, for the uses designated in subsection (c) of this section, except that with respect to income which accrues under clause (1) of this subsection, the Commissioner may prescribe regulations imposing a ceiling on income from such vending machines for an individual blind licensee. In the event such a ceiling is imposed, no blind licensee shall receive less vending machine income under such ceiling that he was receiving on January 1, 1974. No limitation shall be imposed on income from vending machines, combined to create a vending facility, which are maintained, serviced, or operated by a blind licensee. Any amounts received by a

blind licensee that are in excess of the amount permitted to accrue to him under any ceiling imposed by the Commissioner shall be disbursed to the appropriate State agency under clause (2) of this subsection and shall be used by such agency in accordance with subsection (c) of this section.

(b) Direct competition between vending machine and vending facility; proportion of accrued income from such vending machines for individual licensee

(1) After January 1, 1975, 100 per centum of all vending machine income from vending machines on Federal property which are in direct competition with a blind vending facility shall accrue as specified in subsection (a) of this section. "Direct competition" as used in this section means the existence of any vending machines or facilities operated on the same premises as a blind vending facility except that vending machines or facilities operated in areas serving employees the majority of whom normally do not have direct access to the blind vending facility shall not be considered in direct competition with the blind vending facility. After January 1, 1975, 50 per centum of all vending machine income from vending machines on Federal property which are not in direct competition with a blind vending facility shall accrue as specified in subsection (a) of this section, except that with respect to Federal property at which at least 50 per centum of the total hours worked on the premises occurs during periods other than normal working hours, 30 per centum of such income shall so accrue.

(2) The head of each department, agency, and instrumentality of the United States shall insure compliance with this section with respect to buildings, installations, and

facilities under his control, and shall be responsible for collection of, and accounting for, such vending machine income.

(c) Disposal of accrued vending machine income by State licensing agency

All vending machine income which accrues to a State licensing agency pursuant to subsection (a) of this section shall be used to establish retirement or pension plans, for health insurance contributions, and for provision of paid sick leave and vacation time for blind licensees in such State, subject to a vote of blind licensees as provided under section 107b(3)(E) of this title. Any vending machine income remaining after application of the first sentence of this subsection shall be used for the purposes specified in sections 107b(3)(A), (B), (C), and (D) of this title, and any assessment charged to blind licensees by a State licensing agency shall be reduced pro rata in an amount equal to the total of such remaining vending machine income.

(d) Income from vending machines in certain locations excepted

Subsections (a) and (b)(1) of this section shall not apply to income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by Title 10, or to income from vending machines operated by the Veterans Canteen Service, or to income from vending machines not in direct competition with a blind vending facility at individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually.

(e) Regulations establishing priority for operation of cafeterias

The Secretary, through the Commissioner, shall prescribe regulations to establish a priority for the operation of cafeterias on Federal property by blind licensees when he determines, on an individual basis and after consultation with the head of the appropriate installation, that such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees, whether by contract or otherwise.

(f) Existing arrangements more favorable to blind licensees unaffected

This section shall not operate to preclude preexisting or future arrangements, or regulations of departments, agencies, or instrumentalities of the United States, under which blind licensees (1) receive a greater percentage or amount of vending machine income than that specified in subsection (b)(1) of this section, or (2) receive vending machine income from individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually.

(g) Regulating for compliance

The Secretary shall take such action and promulgate such regulations as he deems necessary to assure compliance with this section.

§ 107d-4. Training programs for maximum vocational potential for blind

The Commissioner shall insure, through promulgation of appropriate regulations, that uniform and effective training programs, including on-the-job training, are provided for blind individuals, through services under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.]. He shall further insure that the State agencies provide programs for upward mobility (including further education and additional training or retraining for improved work opportunities) for all trainees under this chapter, and that follow-along services are provided to such trainees to assure that their maximum vocational potential is achieved.

§ 107e. Definitions

As used in this chapter-

(1) "blind person" means person whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater that twenty degrees. In determining whether an individual is blind, there shall be an examination by a physician skilled in diseases of the eye, or by an optometrist, whichever the individual shall select;

(2) "Commissioner" means the Commissioner of the Rehabilitation Services Administration;

(3) "Federal property" means any building, land, or other real property owned, leased, or occupied by any department, agency, or instrumentality of the United States (including the Department of Defense and the United State Postal Service), or any other

instrumentality wholly owned by the United States, or by any department or agency of the District of Columbia or any territory or possession of the United States;

(4) "Secretary" means the Secretary of Education;

(5) "State" means a State, territory, possession, Puerto Rico, or the District of Columbia;

(6) "United States" includes the several States, territories, and possessions of the United States, Puerto Rico, and the District of Columbia;

(7) "vending facility" means automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment as the Secretary may by regulation prescribe as being necessary for the sale of the articles or services described in section 107a(a)(5) of this title and which may be operated by the blind licensees; and

(8) "vending machine income" means receipts (other than those of a blind licensee) from vending machine operations on Federal property, after cost of goods sold (including reasonable service and maintenance costs), where the machines are operated, serviced, or maintained by, or with the approval of, a department, agency, or instrumentality of the United States, or commissions paid (other than to a blind licensee) by a commercial vending concern which operates, services, and maintains vending machines on Federal property for, or with the approval of, a department, agency, or instrumentality of the United States.

§ 107e-1. Repealed. Pub.L. 93-516, Title II, § 205, Dec. 7, 1974, 88 Stat. 1626

§ 107f. Authorization of appropriations

There is authorized to be appropriated such sums as may be necessary for carrying out the provisions of this chapter.

Supreme Court
FILED
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CLERK

No. 96-1550, 1551

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MARYLAND STATE DEPARTMENT OF EDUCATION,
DIVISION OF REHABILITATION SERVICES,
Petitioner,

v.

UNITED STATES DEPARTMENT OF VETERAN AFFAIRS, et al.,
Respondents.

THE NATIONAL FEDERATION OF THE BLIND
and DONALD J. MORRIS,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERAN AFFAIRS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE OF THE STATES OF NEVADA, ALABAMA, ALASKA, ARIZONA, HAWAII, KANSAS, MASSACHUSETTS, MICHIGAN, MONTANA, VERMONT, VIRGINIA, WASHINGTON, AND WEST VIRGINIA SUPPORTING PETITIONERS

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INTEREST OF THE AMICI CURIAE

States are deprived of an effective dispute resolution procedure in disagreements with federal agencies arising under the Randolph-Sheppard Act (20 U.S.C. §§ 107-107f and hereafter referred to as "the Act") by the decision below. The Act gives blind persons licensed by a State licensing agency priority to operate vending facilities on federal property. Disagreements between the States on behalf of blind vendors and the federal property managers are decided under an arbitration procedure. The court of appeals's decision holds that an arbitration panel can not order a remedy if it finds the federal government violated the Act.

The Amici States have instituted or may institute the arbitration procedures in response to a federal agency's refusal to provide the required facilities for blind vendors or other violation of the Act. For example, Nevada is currently in an arbitration proceeding on behalf of thirty eight per cent of the blind vendors placed on federal property within its State. The decision of the court of appeals undercuts the value of the arbitration panels and delays the proceedings because a federal agency is not compelled to comply with the Act regardless of the number of times a State proves its case. This harms blind vendors and encourages federal agencies to ignore the Act. The issue is not unique to Maryland. It is of nationwide concern.

SUMMARY OF ARGUMENT

The holding of the court of appeals for the fourth circuit conflicts with the opinions of the courts of appeals for the eighth circuit and the District of Columbia circuit on whether an arbitration panel under the Act may include a remedy in its decision. This is an important issue as Congress created and expanded employment opportunities for blind persons by giving them priority to operate businesses on federal property. The Act's arbitration procedure resolves disputes between State agencies licensing the blind individuals and the federal property manager. The fourth circuit opinion that the arbitration panel's decision cannot include a remedy destroys the effectiveness of that procedure. This is because a federal agency found to violate the Act may simply continue violating the Act without having to change any acts or practices.

In addition, courts defer to agency interpretation of a statute. The Secretary of Education resolved any ambiguity in the Act by regulation and by the decision of an arbitration panel which is a final agency action. Further, the Secretary's arbitration panel included a remedy in its decision. The court below did not defer to the Secretary's interpretation of the Act in regulation and in the arbitration panel's decision.

Finally, the court below incorrectly interpreted the plain language of 20 U.S.C. § 107d-2(b). The one sentence relied upon by the court of appeals instructs a federal agency found violating the law to stop all acts or practices in violation of the law and to implement the arbitration panel's decision including the remedy. That sentence does not take away the arbitration panel's authority to include a remedy in its decision.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

In *Maryland State Dept. of Educ. v. U.S. Dept. of Veterans Affairs,* 98 F.3d 165 (4th Cir. 1996) the court of appeals for the fourth circuit held that an arbitration panel deciding a dispute between a State and the federal government under the Act has no authority to decide a remedy if it finds the federal government violated the Act. This is consistent with the eleventh circuit court of appeals in *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990) and a district court in *U. S. v. Mississippi Vocational Rehabilitation for the Blind,* 794 F. Supp. 1344, *amended*, 812 F. Supp. 85 (S.D. Ms. 1992).

In contrast, the eighth Circuit and the District of Columbia Circuit ruled that an arbitration panel may order a remedy when it concludes a federal agency violated the law. In *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90 (D.C. Cir. 1986) the court of appeals dismissed an action brought under the Act for failure to exhaust an administrative remedy. It held that an arbitration panel had "broad remedial powers under the Act." 795 F.2d at 109. The possible remedies included invalidating contracts issued by federal agencies to businesses, prospective relief as to future contracts, and placing blind vendors at selected federal properties. Similarly, the eighth circuit court of appeals affirmed an order requiring the U.S. Department of Veterans Affairs to follow the permit procedure established by the Act. *Minnesota Dept. of Economic Security v. Riley*, 18 F.3d 606 (8th Cir. 1994).

The same or similar sections of law (20 U.S.C. §§ 107d-2 and 107d-1(a) and (b)) define the authority of an

arbitration panel in disputes between a blind vendor and a State as in disputes between a State and the federal government. The courts of appeals of three circuits have ruled that an arbitration panel may include a remedy when deciding disputes between a State and a blind vendor. *Delaware Dept. of Health and Social Services, Div. for Visually Impaired v. U.S. Dept. of Educ.*, 772 F.2d 1123 (3d Cir. 1985) (arbitration panel may award compensatory damages and attorney's fees in a decision under 20 U.S.C. § 107d-1(a) which has same words as 20 U.S.C. § 107d-1(b)); *McNabb v. U.S. Dep't. of Educ.*, 862 F.2d 681 (8th Cir. 1988) (per curiam), *cert. denied, sub nom. McNabb v. Cavazos*, 493 U.S. 811 (1989) (arbitration panel may award prospective damages); *Tennessee Dept. of Human Services v. U.S. Department of Educ.*, 979 F.2d 1162 (6th Cir. 1992) (arbitration panel may award accrued vending machine income). See also *Helms v. McDaniel*, 657 F.2d 800 (5th Cir., 1981) *cert. denied*, 455 U.S. 946 for consideration of the meaning of the term final decision under the Individuals with Disabilities Education Act in 20 U.S.C. § 1415(e)(1).

In summary, the decision of the fourth circuit court of appeals conflicts with the decisions of the court of appeals of the eighth and District of Columbia circuits. The Court should grant a petition for certiorari.

II. WHETHER AN ARBITRATION PANEL MAY ORDER A REMEDY IS AN IMPORTANT MATTER UNDER SUPREME COURT RULE 10.

A writ of certiorari should be granted because this is an important matter not yet decided by this court. The purpose of the Act is to provide employment opportunities to blind people. Title 20 U.S.C. § 107(a) states:

> For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in

> striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

The United States Secretary of Education (hereafter, "Secretary") promulgated regulations implementing the Act. 34 C.F.R. pt. 395. Under the regulations, a State submits a permit including the terms and conditions of operating the facility to the federal property manager. 34 C.F.R. § 395.16. If the federal department approves the permit, it is issued to the State agency. The State agency places a blind vendor at the federal property to operate a vending stand. 34 C.F.R. §§ 395.34, 395.35, and 395.7.

In 1974, the Congress amended the Act to include arbitration procedures to resolve disputes between States and the federal government. Section 206, Pub.L. 93-516, codified at 20 U.S.C. §§ 107d-1(b), 107d-2(a), and 107d-2(b)(2). Disputes between the blind vendor and a State agency are governed by 20 U.S.C. §§ 107d-1(a), 107d-2(a), and 107d-2(b)(1). A blind vendor may not file an arbitration complaint directly against the federal government. *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990).

The decision in *Maryland State Dept. of Educ. v. U.S. Dept. of Veterans Affairs*, 98 F.3d 165 (4th Cir. 1996) weakens the enforcement mechanism available to blind vendors and the State licensing agencies which protect them. Essentially, the fourth circuit court of appeals held that an arbitration panel may only find if a federal agency violated the Act. Any specific steps or remedies to comply with the Act must be determined by the federal agency which violated the law already. If a State licensing agency believes the remedy proposed by the federal property manager also violates the law, the State agency must file another complaint convening another arbitration panel. 98 F.3d at 171.

Presumably, a second arbitration panel could agree with the State agency determining the federal agency violated the law. Once again, the second panel could not order any specific remedy. Rather, the federal property manager would propose another action which could violate the law forcing the State to file a third arbitration complaint. There could be no end to the procedure while a blind person licensed by a State agency remains unemployed.

Blind vendors are already limited by statute in the procedures they may use to obtain compliance with the "priority" established by 20 U.S.C. § 107(b). They cannot file arbitration complaints directly against the federal property manager where their business is located. The Act is weakened if a federal agency may simply not comply with the law.

In summary, the Congress has established a priority for blind people to operate vending stands on federal property. The law currently provides no direct dispute resolution procedure for disputes between the blind vendor and the federal government. The decision below weakens the ability of State agencies to advocate on behalf of the blind population who are to benefit from this law.

III. THE SECRETARY HAS INTERPRETED THE ACT TO SAY THAT A FINAL AND BINDING DECISION INCLUDES A REMEDY. THE COURT SHOULD DEFER TO THAT DECISION.

Three sections of the Act describe the arbitration panel's decision in disputes between State licensing agencies and federal property managers. First, 20 U.S.C. § 107d-1(b) states, "...the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

Next, 20 U.S.C. § 107d-2(a) says, "Such panel shall, in accordance with the provisions of subchapter II of chapter

5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5." Finally, 20 U.S.C. § 107d-2(b)(2) says,

> "If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel."

The fourth circuit court of appeals relied upon this last section in making its decision.

Courts defer to agency interpretation of statutes. *Smiley v. Citibank*, _____ U.S. _____, 116 S.Ct. 1730 (1996). *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845, 104 S.Ct. 2778, 2781-2783, 81 L.Ed. 2d 694 (1984). Here, the Secretary's regulation stated the decision was final subject only to review Administrative Procedures Act ("APA"). Title 34 C.F.R. § 395.37(b) states:

> "... (the panel's) decision which shall be final and binding on the parties except that such decision shall be subject to appeal and review as a final agency action for purposes of the provisions of 5 U.S.C. ch. 7."

In this case, the Secretary analyzed all three sections of the Act passed by Congress. He decided that the decision of the arbitration panel was to be final subject only to review under the APA. The Secretary had the opportunity to review the ambiguity, if any, created by the Act and decided to

interpret these three sections of the statute as creating a final decision including a remedy.

This is further shown by the Secretary's decision in this case. On behalf of the Secretary, the arbitration panel ordered the Department of Veterans Affairs to provide a specific remedy, that is, a permit to the Maryland State licensing agency to operate a vending facility. Agency decisions in interpreting agency regulation are entitled to deference. *Thomas Jefferson University v. Shalala,* 512 U.S. 504, 114 S.Ct. 2381 (1994). As Justice Stevens wrote in the majority opinion in *Gardebring v. Jenkins,* 485 U.S. 415, 430 (1988).

> (W)hen it is the Secretary's regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.

In this case, the Secretary has interpreted the Act to provide for a final decision which includes a remedy. The arbitration panel on behalf of the Secretary issued a decision including a remedy. The Court should defer to the Secretary's interpretation that a final and binding decision includes a remedy.

IV. THE WORDS OF THE ACT REQUIRE A DECISION OF AN ARBITRATION PANEL TO INCLUDE A REMEDY.

In this case, three different sections of law must be considered to decide if a remedy is to be included in a final decision of an arbitration panel. Title 20 U.S.C. § 107d-1(b)

describes the decision as final and binding. Title 20 U.S.C. § 107d-2(a) says the decision is a final agency action subject to judicial review under the Administrative Procedures Act.

The court below relied exclusively upon 20 U.S.C. § 107d-2(b)(2) which says,

> If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

The plain language of this statute supports the States. This sentence instructs federal property managers to: (1) stop any violations of the Act found by a panel; and (2) take any other action needed to carry out the decision of the panel. It does not prohibit an arbitration panel from including a remedy in its decision. An arbitration panel appointed under the Act may include a specific remedy in its decision.

Rules of statutory construction support this plain reading of 20 U.S.C. § 107d-2(b)(2). Remedial statutes should be interpreted liberally. *Atchison, Topeka, and Santa Fe Ry. Co. v. Buell,* 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987). Further, as the Court stated in *Philbrook v. Glodgett*, 421 U.S. 707, 713-714, 95 S.Ct. 1893, 1898-99 44 L.Ed.2d 525 (1975) which states:

> "In expounding a statute, we must not be guided by a single sentence or member of sentence, but look to the provisions of the whole law, and to its object and policy." (cites

> omitted)...Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will...."

Construing the Act liberally and looking at all three sections governing the contents of an arbitration panel decision, a decision may include a remedy. The decision is to be final and binding. 20 U.S.C. § 107d-1(b). It is to be a final agency action. 20 U.S.C. § 107d-2(a).

Court interpretations of the final decision requirement of the Individuals with Disabilities Education Act (20 U.S.C. §§ 1400-1484) support the principle that a final decision includes a remedy. Title 20 U.S.C. § 1415(e)(1) states:

> A *decision* made under subsection (c) of this section *shall be final*, except that any party may bring an action under paragraph (2) of this subsection. (emphasis added)

A hearing panel's decision finding a child with a disability was entitled to a private school placement but declining to decide at what school was not a final decision and violated this section. *Slack v. State of Del. Dept. of Public Instruction,* 826 F. Supp. 115 (D.Del. 1993). A decision which is final under federal statute must include a remedy.

The sentence of 20 U.S.C. § 107d-2(b)(2) relied on by the court below instructs a federal agency to stop the violations "promptly" and to carry out the decision of the panel. This instruction does not take away the authority to decide a remedy. Rather, it directs the federal agency to stop all violations and implement the remedy contained in the decision of the arbitration panel.

In conclusion, the court of appeals for the fourth circuit violated common rules of statutory construction in reaching its decision. The plain language of the statute describes the

arbitration panel's decision as final and binding. The sentence relied upon by the fourth circuit court of appeals directs the federal agency to stop violating the law and implement the decision of the panel including a remedy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 30, 1997.

Respectfully submitted,

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Nos. 96-1550 and 1551

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE NATIONAL FEDERATION OF THE BLIND, DONALD J. MORRIS, and MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE NATIONAL COUNCIL OF STATE AGENCIES FOR THE BLIND AND THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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IN THE

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OCTOBER TERM, 1996

Nos. 96-1550 and 1551

THE NATIONAL FEDERATION OF THE BLIND, DONALD J. MORRIS, and MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE NATIONAL COUNCIL OF STATE AGENCIES FOR THE BLIND AND THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AS *AMICI CURIAE* SUPPORTING PETITIONERS

This Brief *Amicus Curiae* of the National Council of State Agencies for the Blind ("NCSAB") and the National Association of Social Workers ("NASW") is submitted pursuant to Supreme Court Rule 37. The NCSAB has sought and obtained consent from Petitioners and Respondents to file this Brief and, thus, this Brief is submitted without a motion pursuant to Supreme Court Rule 37.*

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* Pursuant to Supreme Court Rule 37.6, counsel of record for the NCSAB, Attorney Jack Duncan, did in part author this Brief *Amici Curiae*. Attorney Craig Galle of the St. Louis, Missouri law firm of Greensfelder, Hemker & Gale substantially contributed to the authorship of this Brief. Mr. Galle was retained by and was paid

STATEMENT OF INTEREST

The Maryland State Department of Education, Division of Rehabilitation Services ("MSDE"), one of the Petitioners for a Writ of Certiorari in the case at bar, is a State Licensing Agency ("SLA") within the meaning of the Randolph-Sheppard Act, 20 U.S.C. § 107, *et seq.* The NCSAB is an organization consisting of SLAs from each of the fifty States in the United States. The MSDE is one of the members of the NCSAB, and it is for this reason that the NCSAB submits this Brief *Amicus Curiae* in support of the Petitions filed in this case by the MSDE and the National Federation of the Blind and Donald J. Morris ("NFB").

The National Association of Social Workers (NASW) is the largest association of professional social workers in the world with over 155,000 members and 55 chapters nationally and internationally. The Maryland Chapter of NASW represents social workers in Maryland with over 4,200 members. Founded in 1955 from the merger of seven predecessor social work organizations, NASW is devoted to promoting the quality and effectiveness of social work practice and to the development and application of NASW's policy statement on "People with Disabilities."

As stated in this policy statement, NASW supports the rights of people with disabilities to participate fully and equitably in society. These rights include the freedom, to the fullest extent possible, of all people with disabilities to live independently, to enjoy the rights of full societal membership, to exercise self-determination, and to have full participation in issues related to education, housing, transportation, work, healthcare, social services, and other public accommodations."

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by the NCSAB, and is thus also counsel for the NCSAB. The NCSAB is solely responsible for all costs incurred for the preparation, filing and service of this Brief, and no monetary contribution to the preparation or submission of this Brief has been made by any other party.

STATEMENT OF THE CASE

The NCSAB and NASW adopt the Statement contained in the MSDE's Petition as supplemented by the Statement contained in the NFB's Petition.

SUMMARY OF ARGUMENT

Because the civil rights of the blind have been placed in jeopardy by the decision of the Court below, and because of the confusion which exists concerning the Act in general, the NCSAB respectfuly but strenuously urges this Court to exercise its Certiorari Jurisdiction in order to clarify the responsibilities of the States under the Act. The NCSAB and NASW further urge this Court to take Certiorari Jurisdiction of this case in order to determine exactly how and to what degree the Randolph-Sheppard Act ought to be construed with and applied like the Rehabilitation Act of 1973, and other similar civil rights statutes.

In order to insure uniformity of enforcement throughout the Nation, the NCSAB and NASW also urge that this Court clarify the powers of the Secretary of Education under the Act.

ARGUMENT

I. THE PROFOUND CONFUSION REGARDING THE ACT MAKES IT PRACTICALLY IMPOSSIBLE FOR STATE AGENCIES TO ABIDE BY, LET ALONE ENFORCE, THIS FEDERAL LAW.

The Petitions of the MSDE and the NFB amply chronicle the split in the Circuits concerning the meaning and scope of the Act, and the NCSAB and NASW concur that such a split in and of itself is a sound reason for this Court to issue a Writ of Certiorari in the case at bar. However, from the perspective of the State agencies that must enforce this Act, a far more cogent basis for requesting this Court to exercise Certiorari Jurisdiction over the case at bar is the profound confusion and uncertainty which exists concerning the meaning of the Act, and the

resulting doubt as to just how the States are to insure compliance with the Act.

The confusion which manifestly exists among the Circuits concerning the Act has, as a pratical matter, made it virtually impossible for the States to protect blind vendors who must make their living on federal property, which clearly is a central responsibility of the States under the Act. Because this confusion involves the most fundamental civil rights of a large number of blind citizens in this Country, it is particularly appropriate for this Court to exercise its Certiorari Jurisdiction to resolve that confusion.

The States in this Nation, through and by their SLAs, have been given the responsibility of finding and securing employment opportunities for blind citizens on federal property. 20 U.S.C. § 107a(b). The Act by its terms is not an affirmative action statute, but is rather more in the nature of a precursor to the "welfare to work" statutes which are now popular in a number of States, such as Wisconsin. *Cf.* Wis. Stat. § 49.29.[1]

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[1] The Act essentially is an employment law providing for the employment opportunities and working conditions of blind vendors. In effect, a blind vendor under the Act operates a small business enterprise in partnership with a state licensing agency under the authority of 20 U.S.C. § 107b; *cf.* 34 C.F.R. §§ 395.4, 395.6, and 395.7. Apparently, Congress intended state licensing agencies to be senior partners in that partnershlip. *See, e.g.*, 20 U.S.C. § 107d-3(a), which authorizes the state licensing agency to place a ceiling on the amount of income that a blind licensee can receive from vending machines on federal property. *Cf.* 34 C.F.R. § 395.5 and § 395.8. Consistent with the interpretation that the act is an employment law, 34 C.F.R. § 395.11 mandates that state licensing agencies provide vocational and other training services to blind vendors, including on-the-job training in all aspects of vending facility operation. Moreover, each state licensing agency must, in issuing licenses for the operation of blind vending facilities on federal property, give preference to blind persons in need of employment. 20 U.S.C. § 107a(b).

Because blind vendors earn money which is subject to control by state licensing agencies (34 C.F.R. § 395.8 and § 395.9) and federal

Congress, in its wisdom, has mandated that the States, again through and by their SLAs, must insure that the several federal agencies provide appropriate space for blind vending stands on federal property administered by the federal agencies.[2] Congress has further mandated that the States, again through and by their SLAs, are responsible for enforcing the provisions of the Act against federal agencies, and for safeguarding the working conditions, and by implication the civil rights, of blind citizens on federal property.

The sole and exclusive method by which the SLAs are to accomplish this task is by means of an arbitration panel convened pursuant to the very provision of the

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property managers (34 C.F.R. § 395.32), and because the working conditions and other conditions of employment of the blind vendor are regulated in detail by state licensing agencies (34 C.F.R. § 395.6 and § 395.10), it is not at all surprising to find Congress speaking in terms of the "final and binding arbitration of disputes" arising between the parties subject to the Act.

[2] 20 U.S.C. § 107a(d)(1), which provides:

> After January 1, 1975, no department, agency, or instrumentality of the United States shall undertake to acquire by ownership, rent, lease, or to otherwise occupy, in whole or in part, any building unless, after consultation with the head of such department, agency, or instrumentality and the State licensing agency, it is determied by the Secretary that (A) such building includes a satisfactory site or sites for the location and operation of a vending facility by a blind person, or (B) if a building is to be constructed, substantially altered, or renovated, or in the case of a building that is already occupied on such date by such department, agency, or instrumentality, is to be substantially altered or renovated for use by such department, agency, or instrumentality, the design for such construction, substantial alteration, or renovation includes a satisfactory site or sites for the location and operation of a vending facility by a blind person. Each such department, agency, or instrumentality shall provide notice to the appropriate State licensing agency of its plans for occupation, acquisition, renovation, or relocation of a building adequate to permit such State agency to determine whether such building includes a satisfactory site or sites for a vending facility.

Act which is at issue in the case at bar, *i.e.*, 20 U.S.C. § 107d-1(b).

The SLAs are completely at a loss as to how they can comply with the requirements of the Act when they are faced with decisions, such as the one below, which hold that panels convened pursuant to § 107d-1 have no remedial powers whatsoever. *Maryland State Department of Education v. United States Department of Veterans Affairs*, 98 F.3d 165, 168 (4th Cir. 1996); *Georgia Department of Health and Social Services v. Nash*, 915 F.2d 1482, 1492 (11th Cir. 1990). The SLAs' consternation is exacerbated by the fact the SLAs are faced with obstinate federal agencies which force the SLAs into long and protracted litigation attempting to obtain compliance with panel decisions in Circuits where the decisions of the panels are deemed to have remedial powers. *See, e.g., Minnesota Department of Jobs & Training v. Riley*, 18 F.3d 606 (8th Cir. 1994) and *Minnesota Department of Economic Security v. Riley*, 107 F.3d 648 (8th Cir. 1997).

Candidly, the SLAs are confused and frustrated. Tragically, their confusion and frustration implicates and affects not just the interests of the States, but also the rights of blind vendors. In point of fact, the uncertainty and inability of the SLAs to fulfill their mandate under the Act effects adversely the most fundamental civil rights of the blind citizens who have acquired substantial property interests, and must make their living under the Act in the States of the Nation.

The Secretary of Education, who should assist the States in resolving this uncertainty, has been inexplicably silent throughout much of the litigation concerning the Act, adding to the confusion about how the SLAs are to comply with the requirements of the Act.

The fact that the DVA did not seek appropriate approval from the Secretary of Education for the DVA's attempted limitation in the case at bar on the placement

of a blind vending stand at the VAMC under 20 U.S.C. § 107(b) was placed in issue by the NFB in its Brief *Amicus Curiae,* filed with the Court of Appeals on November 21, 1995. Nevertheless, the Court below did not address this fact, nor did it address the absence of the Secretary of Education as a party to the proceedings below.

The NCSAB and NASW earnestly request that this Court exercise its Certiorari Jurisdiction in order to clarify the responsibilities of the States under the Act.

II. BECAUSE THE ACT IS A CIVIL RIGHTS STATUTE, AND BECAUSE THE RIGHTS OF THE BLIND UNDER THE ACT HAVE BEEN IMPERILED BY THE DECISION BELOW, THERE IS AN URGENT NEED TO RECEIVE CLARIFICATION FROM THIS COURT.

While not styled as such, the Randolph-Sheppard Act is a civil rights statute and ought to be construed accordingly. Moreover, according to *3 Sutherland on Statutory Construction* § 60.01, at p. 147 (5th ed. 1992):

> Remedial statutes are liberally construed to suppress the evil and advance the remedy. The policy that a remedial statute should be liberally construed in order to effectuate the remedial purpose for which it was enacted is firmly established.

A. The Randolph-Sheppard Act and the Rehabilitation Act of 1973 Are Closely Related "Sister Acts," and Ought to Be Read and Construed Together.

The legislative history underlying the Randolph-Sheppard Act demonstrates that the 1974 Amendments to the Randolph-Sheppard Act, the Rehabilitation Act of 1973, and the Americans With Disabilities Act of 1990 ("ADA") are very closely related civil rights laws, and thus ought to be read and construed as though part of the same Act.

In fact, Congress originally intended that the 1974 Amendments to the Randolph-Sheppard Act and the Re-

habilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, were to be combined in the same legislation. Indeed, the 1974 Amendments to the Randolph-Sheppard Act were originally included as a separate title to the Rehabilitation Act but were segregated from the Rehabilitation Act at the last moment because of a "point of order" in the House under its germaneness rule.

> On September 14, 1971, I [Sen. Randolph] introduced S.2506, the 'Randolph-Sheppard Act for the Blind Amendments of 1971.' Hearings were held on that measure in September, October, and December of 1971. The provisions, again very similar to those in the bill I am introducing, were included as a title in the Senate's Rehabilitation Act of 1972. Unfortunately, when that measure was brought to conference, the House conferees indicated that the Randolph-Sheppard provisions would be subject to a point of order in the House because of its germaneness rule. The provisions were dropped from the conference report, with the explicit understanding of the need for action.

119 Cong. Rec. 34,082 (1973).

Rather than delay the enactment of the Rehabilitation Act pending a resolution of the point of order issue, Congress merely segregated out the Randolph-Sheppard Act 1974 Amendments and passed the Rehabilitation Act of 1973 forthwith with the stated intention of addressing and enacting the Randolph-Sheppard Amendments in its next term. *Id.*

The legislative history of the Rehabilitation Act of 1973 reinforces the foregoing affinity betwen that Act and the Randolph-Sheppard Act. The Rehabilitation Act "in effect strengthens the Randolph-Sheppard Act and gives added protection to the blind." 120 Cong. Rec. 35,712 (1974). Moreover, that same legislative history clearly demonstrates that the Randolph-Sheppard Act was "the third in a series of bills" on the subject of protecting and affording rights to the disabled. 120 Cong. Rec.

20,117 (1974) (statements of Sen. Randolph). Because the 1974 Amendments to the Randolph-Sheppard Act and the Rehabilitation Act of 1973 were a part of the same legislation, it leads to the inescapable conclusion that they are to be interpreted in the same manner. *Cf.* 120 Cong. Rec. 35,712 (1974).

Similarly, the ADA is to be judicially interpreted in the same manner as the Rehabilitation Act of 1973. *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832, n.3 (9th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 711, 133 L.Ed.2d 666 (1996). This determination is based on the substantially identical language in the two Acts and the legislative history of the ADA which indicates that Congress intended judicial interpretation of the Rehabilitation Act to be incorporated by reference into the interpretation of the ADA. *Id.*

It is well recognized that both the ADA and the Rehabilitation Act of 1973 were enacted by Congress pursuant to its authority under the Fourteenth Amendment to the United States Constitution. In turn, as this Court has often held, the Fourteenth Amendment incorporates by reference the Bill of Rights to the United States Constitution. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990); *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967).

The ADA specifically states that its purpose is "to invoke the sweep of Congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities." 42 U.S.C. § 12101(b)(4); *see also Mayer v. University of Minnesota*, 940 F. Supp. 1474, 1480 (D. Minn. 1996) (ADA was enacted pursuant to the Fourteenth Amendment). Similarly, courts have repeatedly held that the Rehabilitation Act of 1973 was enacted by the Congress pursuant to the Fourteenth Amendment to the United States Constitution. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 472, n.2

(1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243-244 (1985); *Union Pacific Railroad Co. v. Burton*, 1996 WL 733943, *9 (D. Wy. Dec. 24, 1996).

Because the 1974 Amendments to the Randolph-Sheppard Act and the Rehabilitation Act of 1973 were originally intended to be a part of the same legislation, and since the Randolph-Sheppard Act Amendments were in their pre-inception a sub-title to what became the Rehabilitation Act of 1973, it follows that, like the Rehabilitation Act and the ADA, the Randolph-Sheppard Act Amendments were also enacted pursuant to the Fourteenth Amendment. Thus, a Randolph-Sheppard Act arbitration panel convened pursuant to 20 U.S.C. § 107d-1(a) may properly award damages against a State, despite the Eleventh Amendment. *Delaware Department of Health and Social Services v. United States Department of Education*, 772 F.2d 1123 (3rd Cir. 1985). Similarly, an arbitration panel convened pursuant to 20 U.S.C. § 107d-1(b) is also authorized to award damages or provide for other relief against federal agencies. *Cf. Texas State Commission for the Blind v. United States*, 796 F.2d 400 (Fed. Cir. 1986).

While federal executive agencies are exempt from the ADA, they are covered by §§ 501 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794, which incorporate the remedies, procedures and rights set forth in Title VII (42 U.S.C. § 2000e-16(c)) for federal employees. 29 U.S.C. § 794a(a)(1). According to Lindemann & Grossman, 1 *Employment Discrimination Law* 336 (ABA 1996):

> The 1978 amendments to the Rehabilitation Act provide that the remedies and procedures for implementing and enforcing § 717 of Title VII also apply to § 501 [of the Rehabilitation Act]. The charge-filing, investigation, and hearing procedures, including awards of attorney's fees, are the same for federal employees under § 501 as they are under Title VII and the Age Discrimination in Employment Act.

Admittedly, the Randolph-Sheppard Act takes a circuitous route to establish employment opportunities for blind vendors, but those vendors are nevertheless self-employed licensees of the SLAs (in effect business partners with the several SLAs) who must make their living on federal property.[8] Like federal employees under the Rehabilitation Act of 1973, the blind vendors, or more properly SLAs on their behalf, should have the ability to pursue remedies against federal agencies when those agencies create unacceptable working conditions for blind vendors or otherwise limit their employment opportunities through and by SLA arbitrations pursuant to 20 U.S.C. § 107d-1(b). It is not at all surprising to find Congress speaking in terms of the "final and binding arbitration of disputes" arising between the parties subject to the Act given the Act's similarity to other employment discrimination laws and the following considerations: a) blind vendors earn money which is subject to control by state licensing agencies (34 C.F.R. § 395.8 and § 395.9) and federal property managers (34 C.F.R. § 395.32); and b) the working conditions and other conditions of em-

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[8] In order to insure that blind licencees have employment opportunities, the Act authorizes state licensing agencies to secure space on property owned by federal agencies sufficient to accommodate blind vendor stands. *See, e.g.*, 34 C.F.R. § 395.30 and § 395.31. At least in part, federal property managers have the right to exercise control over income belonging to blind vendors (34 C.F.R. § 395.32), which right carries with it, in the view of the NCSAB and NASW, fiduciary responsibilities by clear implication.

Congress mandated that state licensing agencies and federal property managers must cooperate to insure compliance with civil rights and other laws by blind vendors on federal property. 34 C.F.R. § 395.35 and § 395.36.

A state licensing agency is, in fact, authorized to assume some of the responsibilities customarily performed by an employer *vis-à-vis* a blind vendor. For example, a state licensing agency is authorized to set aside funds from the net proceeds of the operation of vending facilities for the purposes of "the establishment . . . of retirement and pension funds, health insurance contributions, and provision for paid sick leave and vacation time . . . ." 34 C.F.R. § 395.5(5).

ployment of the blind vendor are regulated in detail by the SLAs (34 C.F.R. § 395.6 and § 395.10).

The NCSAB and NASW respectfully submit that this Court ought to take Certiorari Jurisdiction of this case in order to determine exactly how and to what degree the Randolph-Sheppard Act is to be construed with and applied like the Rehabilitation Act of 1973.

B. Because Safeguards Which Exist Under Other Federal Civil Rights Statutes Are Unavailable Under the Act, the Guidance of This Court Is Urgently Needed in Order to Vouchsafe the Civil Rights of the Blind.

Under Executive Order 12,067,[4] the EEOC is responsible for coordinating the federal effort to enforce federal equal employment opportunity laws. According to Lindemann & Grossman, *supra,* Volume II, at pp. 1245-46:

> The EEOC coordinates with other [federal] agencies in carrying out overlapping mandates. . . . The EEOC . . . has responsibility for investigating employment discrimination complaints against recipients of federal financial assistance subject to Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments Act of 1972, and other similar statutes, where the complaints also allege Title VII, ADA, or Equal Pay Act violations.

Notably missing from the EEOC's jurisdictional responsibilities are the blind under the Act. Instead, the States have been thrust into the role of the EEOC *vis-à-vis* the rights of the blind, and the States are hard-pressed to fulfill this serious duty given the holding of the Court below and the confusion which presently exists concerning the scope and meaning of the Act throughout the Circuit Court of Appeal.

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[4] 43 Fed. Reg. 28,967 (1978).

III. IN ORDER TO INSURE UNIFORMITY OF ENFORCEMENT THROUGHOUT THE NATION, THERE IS A PRESSING NEED TO CLARIFY THE POWERS OF THE SECRETARY OF EDUCATION UNDER THE ACT.

While in practice it has fallen primarily to the States to vouchsafe the rights of the blind under the Act, the NCSAB and NASW respectfully submit that it was the intent of Congress that this responsibility would be shared with the Secretary of Education. Unfortunately, the Secretary has not, or perhaps cannot, fulfill this role. The NCSAB and NASW respectfully submit that this Court should exercise its Certiorari Jurisdiction in order to clarify the role that the Secretary of Education ought to play in enforcing the Act.

A. The Legislative History of the Act Demonstrates That the Secretary of Education Is to Both Interpret and Actively Participate in the Enforcement of the Act.

The predecessor to the Secretary of Education under the Act was the Secretary of Health, Education, and Welfare, and thus references in the Legislative History of the Act to the latter should be understood as applying to the former. 20 U.S.C. § 3441. Congress made it very clear that the Secretary of Education is to occupy a pivotal role in enforcing the Act.

> [W]ith respect to the vending stand program, the conference report requires a priority for blind vendors on Federal property. Overall regulatory authority over the program is vested in the Secretary of Health, Education and Welfare.

120 Cong. Rec. 35,711 (1974).

Elsewhere it is noted that there is under the Act "a requirement that overall authority over, evaluation of, and standards for, the program be placed in the Secretary of HEW. . . ." 120 Cong. Rec. 20,118 (1974). Senator Randolph, the principal author of the Randolph-Sheppard Act, stated in the Randolph-Sheppard hearings that ". . .

the Department of Health, Education and Welfare—HEW —is the principal agency for carrying out the Randolph-Sheppard Act." *Hearings before the SubCommittee on the Handicapped of the Committee on Labor and Public Welfare on S. 2581*, 93rd Cong., 1st Sess. 3 (1974) [in the record below as an appendix to the Brief *Amicus Curiae* of the NFB, filed with the Court of Appeals below on October 21, 1995].

Congress recognized the need for the Secretary of Education to act in an oversight capacity for the Randolph-Sheppard Act program to ensure that federal agencies would comport themselves with the mandates and requirements of the Act.

> A number of witnesses, numerous letters to the committee, and newspaper articles clearly suggested that Federal agencies had not done all that they could to insure the establishment and the maintenance of blind vendors on property under their control. In addition, certain Federal agencies were charged with imposing arbitrary and harmful limitations on blind vendor operations with respect to the kinds of merchandise a blind vendor was permitted to sell, with respect to the location of [a] blind stand, or with respect to the amount permitted to accrue to a vendor.
>
> * * * *
>
> The Committee finds that there is a record of abuses and neglect of the Randolph-Sheppard program by officials of various Federal agencies that is adequate to justify the placement of increased overall authority for its operation with the Secretary of Health, Education, and Welfare.
>
> * * * *
>
> The Committee believes that the Department of Health, Education, and Welfare should be the overseer of the Randolph-Sheppard program throughout the Federal government. As such, it is inevitable that there will be some incursion by that department in matters traditionally handled by other agencies. The Department of Health, Education, and Welfare,

> however, has the expertness and the sensitivity to the problems inherent in the blind vendor program which may be lacking in other agencies. If the program is to be coordinated, well run, and consistent, it must have a coordinator. The only possible choice for this function is HEW.

Senate Report 93-937, at pp. 16 and 19 (J.A. 157).

Although the Secretary of Education's responsibilities under the Randolph-Sheppard Act are wide and varied, one of the principal responsibilities which the Secretary is charged with under the Act is the oversight and administration of the arbitration grievance mechanism under 20 U.S.C. § 107d-1 and § 107d-2 when a dispute arises between a blind vendor and a State or between a State and a federal agency.

> The Secretary is to prescribe such other regulations as are necessary to carry out the provisions of the Act. Further Secretarial responsibilities under S. 2581 include . . . convening of arbitration panels to hear disputes betwen blind licensees and State agencies, and between State agencies and Federal agencies, and payment of arbitration costs.

Senate Report 93-937, at p. 4 (J.A. 157).

For whatever reason, however, the Secretary of Education has been strangely silent in the case at bar, and in many other instances, when the SLAs seek to enforce the Act against federal agencies. Because the actions of the DVA in the case at bar amount to a limitation on the placement or operation of a blind vending stand at the VAMC, it is indeed peculiar that the Secretary of Education was never consulted pursuant to 20 U.S.C. § 107(b), which latter section provides in pertinent part:

> Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the

> Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register.

Shortly after the Act was adopted into law, the Secretary of Education's predecessor had no difficulty construing the meaning of the foregoing provision. According to the Secretary, at 42 Fed. Reg. 15807 (1977):

> When a federal property managing department or agency believes [there should be a limitation on the operation of a vending facility], the head of that department or agency *must* justify his position to the Secretary of Health, Education, and Welfare, who will make the final determination [Emphasis supplied].

If Congress is urged not to adopt a particular provision in a law, but nevertheless does enact same into law, the Congress is presumed to have specifically rejected the suggestions urged upon it. According to 2B Sutherland, supra, at § 49.10, p. 76:

> [Where] practical and contemporaneous interpretation [of a statute] has been called to a legislature's attention, there is more reason to regard the failure of the legislature to change the interpretation as presumptive evidence of its correctness.

In this case, a number of witnesses urged Congress, sometimes strenuously, to delete the requirement that federal property managers would have to seek a determination from the Secretary of Education as to whether the placement or operation of a blind vending facility adversely affects the interests of the United States under 20 U.S.C. § 107(b). The Administration's representative, Mr. Reedy, strongly testified in 1973 against allowing the Secretary of Education to make such determinations: "Responsibility for this finding should, however, rest with the head of the appropriate agency in consultation with the Secretary [of Education] and should not rest with the Secretary [of Education] alone." *Hearings before the*

SubCommittee on the Handicapped of the Committee on Labor and Public Welfare on S. 2581, supra, at p. 38.

In fact, the opposition in 1973 before the Subcommittee to the Secretary of Education's power to make 20 U.S.C. § 107(b) determinations was more strenuous than opposition to the arbitration procedures under 20 U.S.C. §§ 107d-1 and 107d-2. *Id.* The Defense Department was particularly outspoken in its opposition to allowing the Secretary of Education to make a 20 U.S.C. § 107(b) determination. *Hearings before the SubCommittee on the Handicapped of the Committee on Labor and Public Welfare on S. 2851*, pp. 100-101.

There was similar strong opposition from other federal agencies to vesting 20 U.S.C. § 107(b) powers exclusively in the Secretary of Education throughout the foregoing 1973 Hearing Transcript. *Senate Report* No. 93-937, at p. 19 (J.A. 147, *et seq.*) makes it clear the extent of the protests to vesting in the Secretary of Education the power he now possesses under 20 U.S.C. § 107(b):

> In addition, agency witnesses expressed concern about the interference of one Federal agency in the affairs of another. The committee believes that the Department of Health, Education and Welfare [now the Secretary of Education] should be the overseer of the Randolph-Sheppard program throughout the Federal government. As such, it is inevitable that there will be some incursion by that department in matters traditionally handled by other agencies.

Nevertheless, the Congress provided precisely what it was so strongly urged not to provide in 20 U.S.C. § 107(b). In *Boudette v. Barnette*, 923 F.2d 754, 756-757 (9th Cir. 1991), the court applied the doctrine of *expressio unius est exclusio alternius* to determine the meaning of a statute:

> This doctrine [*expressio unius est exclusio alternius*] as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions

> should be understood as exclusions. . . . Thus, if a statute states that a party can invoke an action by request, such request is presumed the exclusive manner in which the action may be invoked.

The DVA has acknowledged the Act applies to it (J.A. 169; 170; 205). The NCSAB and NASW are completely at a loss to explain why the Secretary of Education was not consulted pursuant to 20 U.S.C. § 107(b) in the case at bar concerning the attempt of the DVA to limit the placement of a blind vending facility at the VAMC. Perhaps this Court can determine a method by which to more appropriately involve the Secretary of Education, thus benefiting both the blind citizens of this Country and the States which are now burdened with the responsibility of enforcing this most difficult of Federal laws.

B. The Secretary of Education Could Obviate Many of the Enforcement Problems Presented by This Act, if His Role Were Properly Defined by This Court.

The primacy of the interpretation given to an Act of Congress by an agency charged with its enforcement is virtually hornbook law in this Country. Perhaps certain federal agencies disagree with the wisdom of the Randolph-Sheppard Act, and the interpretation of that Act by the Secretary of Education, but as this Court stated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public inter-

> est are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'

Id. at 865.

The Secretary long ago concluded that under the Act any head of a federal department or agency which would essay to limit a blind vending operation on federal property must justify his position to the Secretary of Education in writing. 42 Fed. Reg. 15807. It is wrong to view the *ad hoc* arbitration panels convened by the Secretary of Education under 20 U.S.C. § 107d-1 as somehow autonomous, self-contained adjudicative bodies. The panels thus convened are clearly meant to be enforcement mechanisms of the Secretary of Education. This is undoubtedly why the Congress specified that the decisions of those panels are to be regarded as final agency action, reviewable as of right under the APA, which decisions are to be published in the Federal Register. 20 U.S.C. § 107d-2.

The NCSAB and NASW respectfully submit that it is time for the Secretary of Education to police affirmatively those panel decisions under and pursuant to the power vested in the Secretary by 20 U.S.C. § 107(b). In so doing, the Secretary can determine whether a particular panel decision is or is not in the interests of the United States, or in the interests of the States, for that matter. If the Secretary of Education is thus able to police those panel decisions, the chances of a rogue panel awarding more than is absolutely necessary to insure the civil rights of the blind will be eliminated. If the Secretary of Education thus polices panel decisions, on the other hand, the civil rights of the blind will be vouchsafed, and the possibility of "Dickinsonian *Bleak House*" litigational nightmares, such as the Eighth Circuit *Riley* decisions, will be at an end, much to the relief of the budgets and Attorneys General of the States.

Certainly, the Secretary of Education has demonstrated an ability to similarly enforce other civil rights statutes

through and by his Office of Civil Rights. *Roberts v. Colorado State Board of Agriculture,* 998 F.2d 824, 827-28 (10th Cir. 1993); *Collier v. William Penn School District,* —— F. Supp. ——, 65 USLW 2597 (E.D. Penn. Feb. 28, 1997); *Cf. Kelley v. Board of Trustees,* 35 F.3d 265, 271 (7th Cir. 1994).

Quite frankly, in the view of the NCSAB and NASW, if the intent of Congress is to be so thoroughly frustrated as it was by the holding of the Court below, then the rights of the blind and the SLAs might be better served by according to the rights of the blind under the Act the same status *vis-à-vis* federal agencies which this Court accorded to the victims of sex discrimination under Title IX in *Franklin v. Gwinnett Public Schools,* 503 U.S. 60 (1992).

CONCLUSION

For all of the foregoing reasons, the NCSAB and NASW respectfully submit that the Petitions of the MSDE and NFB for a Writ of Certiorari in the case at bar should be granted.

Respectfully submitted,

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Nos. 96-1550 and 1551

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE NATIONAL FEDERATION OF THE BLIND, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* THE WISCONSIN ACADEMY OF TRIAL LAWYERS, THE COLORADO TRIAL LAWYERS ASSOCIATION, THE INDIANA TRIAL LAWYERS ASSOCIATION, THE IOWA TRIAL LAWYERS ASSOCIATION, THE MICHIGAN TRIAL LAWYERS ASSOCIATION, THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND THE SOUTHERN POVERTY LAW CENTER SUPPORTING PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Nos. 96-1550 and 1551

THE NATIONAL FEDERATION OF THE BLIND, DONALD J. MORRIS, and MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* THE WISCONSIN ACADEMY OF TRIAL LAWYERS, THE COLORADO TRIAL LAWYERS ASSOCIATION, THE INDIANA TRIAL LAWYERS ASSOCIATION, THE IOWA TRIAL LAWYERS ASSOCIATION, THE MICHIGAN TRIAL LAWYERS ASSOCIATION, THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND THE SOUTHERN POVERTY LAW CENTER SUPPORTING PETITIONERS

This Brief *Amici Curiae* of the Wisconsin Academy of Trial Lawyers,[1] Colorado Trial Lawyers Association, Indiana Trial Lawyers Association, Iowa Trial Lawyers Association, Michigan Trial Lawyers Association, Associa-

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[1] In accordance with Supreme Court Rule 37.4 this brief has primarily been authored by counsel for the Wisconsin Academy of Trial Lawyers with assistance from the other named *Amici*. No other entity has made a monetary contribution to the preparation or submission of the brief.

tion of Trial Lawyers of America, and the Southern Poverty Law Center is submitted pursuant to Supreme Court Rule 37 and has been consented to by the Office of the Solicitor General pursuant to a letter dated May 28, 1996 and by counsel for the Petitioners.

STATEMENT OF INTEREST

The Trial Lawyers represent trial attorneys across the United States who are dedicated primarily to the rights of tort victims. The Trial Lawyers are dedicated to the rule of law and seek to insure that the Justice system in this Nation functions in a manner calculated to insure fundamental fairness for tort victims according to the precepts of Constitutional Law.

Founded in 1971, the Southern Poverty Law Center is a nonprofit organization dedicated to protecting victims of injustice. The Center has brought countless civil rights cases on behalf of minorities, women, poor people in need of health care, mentally ill persons, children in foster care, prisoners and many other persons subject to unfair treatment based on their membership in a disadvantaged group. *Amici* has an interest in this case because it is committed to ensuring that all persons receive the benefits to which they are entitled under federal law.

STATEMENT OF THE CASE

The *Amici* adopt by reference the Statements contained in the Petitions for a Writ of Certiorari filed in this case by the Maryland State Department of Education, Division of Rehabilitative Services ("MSDE") and the National Federation of the Blind ("NFB").

SUMMARY OF ARGUMENT

Blind vendors operating pursuant to the Randolph-Sheppard Act in the Fourth and Eleventh Circuits face a substantial risk of erroneous deprivation of their private property rights without due process safeguards. By limiting these vendors to arbitration panels whose findings are unenforceable, the Courts below have effectively reduced the constitutional rights of these blind individuals.

In addition, the District Court's decision has inappropriately disposed of this case by disregarding the tenets of the Federal Rules of Civil Procedure and the Administrative Procedure Act effectively closing the courthouse doors to judicial review of a Randolph-Sheppard arbitration decision.

ARGUMENT

The *Amici* respectfully submit that certain blind citizens in this Nation have been in many instances unfairly and unconstitutionally deprived of basic Procedural Due Process in terms of how their rights are adjudicated under the Randolph-Sheppard Act, 20 U.S.C. § 107, *et seq.* (the "Act"). The latest and most egregious manifestation of the low regard that some federal agencies have for the rights of these blind vendors is to be found within the four corners of the decision of the Court below.

Blind vendors operating on Federal property pursuant to the Act have no options available to them when their livelihood is threatened. The only mechanism provided to resolve any infringement of the vendors' rights is arbitration. In fact, by the terms of 20 U.S.C. § 107-1, a blind vendor working on federal property does not even have the right to proceed directly against a federal agency that is acting in violation of his or her civil rights.

If a blind citizen working on Federal property as a vendor objects to actions of the federal agency charged with administering that property, that blind citizen must rely on the good faith and diligence of a state licensing agency ("SLA"), such as the MSDE, to make an effort to vindicate that citizen's rights by arbitration under § 107d-1(b). Presumably, if a federal agency fails to provide to a blind vendor adequate heat, electricity, or protection from harassment in the workplace by the terms of 20 U.S.C. § 107d-1(a), the most that a blind vendor can do is encourage, by arbitration if necessary, an SLA to take action on his or her behalf. In *Georgia Department of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990), the Court found that:

> [20 U.S.C. § 107d-1] (a)'s broad language would still entitle the vendor to invoke the remedial procedures provided in that subsection *but only in order to exercise his procedural right to complain.* Although this procedural right gives the vendor no substantive remedy, the right is not entirely empty. It guarantees the vendor *an opportunity to convince the state agency to take action*—to file a complaint pursuant to subsection (b)—even though the agency has discretion not to act. [Emphasis supplied].

Id. at 1488.

Although harsh, the decision in *Nash* did not leave a blind vendor completely without recourse. If a diligent and responsible SLA, such as the one in the case at bar, determined that a federal agency was acting in contravention of the civil rights of a blind citizen working on that agency's property, that SLA could still pursue a remedy against such an agency under 20 U.S.C. § 107d-1(b). At least that appeared to be the case until the decision of the Courts below in the case at bar. Relying on *Nash*, the Court below affirmed the District Court's conclusion that a 20 U.S.C. § 107d-1(b) panel had no remedial powers whatsoever.

As a result, blind vendors, in the Fourth and Eleventh Circuits at least, have nowhere to turn in the event that they find themselves aggrieved by the action of a federal agency charged with administering property where they make a living. They cannot commence a civil action in any court because the arbitration mechanism established to resolve disputes involving "any action arising from the operation or administration of the vending facility program [20 U.S.C. § 107d-1(a)]" has been held to be the exclusive method for resolving such disputes. *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 102-103 (D.C. Cir. 1986).

Although the clear import of the decisions below and the decision in *Nash* is that an arbitration panel under the Act has no remedial power, the Courts below have gone

further than *Nash* and have effectively closed the courthouse door to any effort to secure judicial review of those panel decisions. The foregoing is particularly troubling because, as noted in the NFB's Petition in this case, the Randolph-Sheppard Act is a federal statute that creates a property interest in the blind who must make their living on Federal property. *Petition of the NFB for a Writ of Certiorari*, p. 20-21.

I. THE DECISIONS OF THE COURTS BELOW AND IN *NASH* EFFECTIVELY MAKE IT IMPOSSIBLE FOR BLIND CITIZENS TO ACHIEVE PROCEDURAL DUE PROCESS WHEN SEEKING TO PROTECT THEIR VESTED PROPERTY INTERESTS.

This Court has carefully established the essential parameters and minimum guarantees of Procedural Due Process in a number of cases. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court emphasized:

> This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. Wolff v McDonnell, 418 US 539, 557-558, 41 L Ed 2d 935, 94 S Ct 2963, 71 Ohio Ops 2d 336 (1974). See, e.g., Phillips v Commissioner, 283 US 589, 596-597, 75 L Ed 1289, 51 S Ct 608 (1931). See also Dent v West Virginia, 129 US 114, 124-125, 32 L Ed 623, 9 S Ct 231 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, . . . is a principle basic to our society." Joint Anti-Fascist Comm. v McGrath, 341 US 123, 168, 95 L Ed 817, 71 S Ct 624 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' Armstrong v Manzo, 380 US 545, 552, . . .

Id. at 333.

This Court has made it clear that " 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."

Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether administrative procedures are Constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy*, 416 U.S. 134, 167-68 (1974).

In reliance on *Goldberg v. Kelly*, 397 U.S. 254, 263-271 (1970), this Court stated in *Mathews v.. Eldridge*, *supra*:

> . . . [O]ur prior decisions indicated that identification of the specific dictates of due process generally requires consideration of three distinct facts; First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-335.

Applying this litmus test, it is clear that significant Procedural Due Process protections ought to be available to blind vendors under the Act.

A. The Private Interests Which Are Affected by the Actions of Federal Agencies Such as the DVA Are Substantial.

The private property interests of the blind, and the SLAs for that matter, are substantial. In order to insure that blind licencees have employment opportunities, the Act authorizes SLAs to secure space on property owned by federal agencies sufficient to accommodate blind vendor stands. *See, e.g.*, 34 C.F.R. § 395.30 and § 395.31. A

blind vendor who secures a license from an SLA to operate a blind vending stand on Federal property in effect receives a license to operate a small private business enterprise in partnership with an SLA under the authority of 20 U.S.C. § 107b; *cf.* 34 C.F.R. §§ 395.4, 395.6, and 395.7. The blind licensee does not have a completely free hand to run this business any way he sees fit. For example, 20 U.S.C. § 107d-3(a) allows an SLA to place a ceiling on the amount of income that a blind licensee can receive from vending machines on Federal property. *Cf.* 34 C.F.R. § 395.5 and § 395.8.

However, the blind licensee is given incentives and the ability to succeed as a small business owner which offset any limitations on the licensee's opportunities. Pursuant to 34 C.F.R. § 395.11, SLAs are required to provide vocational and other training services to blind vendors, including on-the-job training in all aspects of vending facility operation. Moreover, each SLA must, in issuing licenses for the operation of blind vending facilities on Federal property, give preference to blind persons in need of employment. 20 U.S.C. § 107a(b).

The resulting blind business operation clearly constitutes a property right of the blind licensee who works on Federal property, not unlike the property interests at issue in *Goldberg v. Kelly*, 397 U.S. 254 (1970). These property interests are defined clearly in 20 U.S.C. § 107b(2) and (3).

Obviously, Congress recognized the need for Due Process protection of the property rights thus created, because, in addition to the provisions of 20 U.S.C. §§ 107d-1 and 107d-2, Congress specified in § 107b(6) that "any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program [must have] an opportunity for a *fair hearing* [emphasis supplied]" and then made a pointed cross-reference to § 107d-1.

There are other equally compelling reasons to conclude that the private interests of blind vendors working on Federal property are substantial and require protection by recourse to some form of a fair hearing dispute resolution mechanism. Blind vendors earn money which is subject to control by state licensing agencies (34 C.F.R. § 395.8 and § 395.9) and federal property managers (34 C.F.R. § 395.32). The working conditions and other conditions of employment of the blind vendor working on Federal property are also regulated in detail by SLAs. 34 C.F.R. § 395.6 and § 395.10. In this regard, a state licensing agency is, in fact, authorized to assume some of the responsibilities customarily performed by an employer *vis-a-vis* a blind vendor. For example, a state licensing agency is authorized to set aside funds from the net proceeds of the operation of vending facilities for the purposes of "the establishment . . . of retirement and pension funds, health insurance contributions, and provisions for paid sick leave and vacation time . . . ." 34 C.F.R. § 395.5(5).

B. Given the Decisions of the Courts Below and the *Nash* Court, the Risk of an Erroneous Deprivation of the Property Rights of Blind Vendors Is Very Great, and the Probable Value of the Substitute Procedural Safeguards Suggested Below Are Very Low.

The *Amici* first take note of the arguments made in Section III of the *Amicus Curiae* Brief of the National Council of State Agencies for the Blind ("NCSAB") in the case at bar. The Randolph-Sheppard Act not only creates and vests property rights in blind vendors working on Federal property, but the arbitration mechanism in 20 U.S.C. §§ 107d-1 and 107d-2 is the only vehicle for vindicating the personal civil rights of those blind vendors. As noted in the NCSAB Brief *Amicus Curiae*, neither the EEOC nor any other federal agency has jurisdiction to vindicate those rights. Indeed, Congress mandated that SLAs and Federal property managers

must cooperate to insure compliance with civil rights and other laws by blind vendors on Federal property. 34 C.F.R. § 395.35 and § 395.36. Against that background, the Trial Lawyers respectfully ask the Court to consider the following.

As noted by the Court below, the Randolph-Sheppard Act is an employment act designed "to 'provid[e] blind persons with remunerative employment, enlarg[e] the economic opportunities of the blind, and stimulat[e] the blind to greater efforts in striving to make themselves self-supporting.' " *Maryland State Department of Education, Division of Rehabilitative Services v. U.S. Department of Veterans Affairs*, 98 F.3d 165, 167 (4th Cir. 1996) (the decision below). The Court below acknowledged that Congress enacted 20 U.S.C. § 107d-1 and § 107d-2 " 'to provide the means by which aggrieved [blind] vendors and State agencies may obtain a final and satisfactory resolution of disputes.' " *Id.* at 171.

The only forum available for the vindication of the rights of the blind under the Act is an *ad hoc* arbitration panel convened by the Secretary of Education pursuant to 20 U.S.C. § 107d-1. *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 102-103 (D.C. Cir. 1986).

In direct disregard of the decision in *Weinberger*, and a number of other decisions of other Courts from other Circuits,[1] the Court of Appeals below affirmed the District

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[1] According to the Court in *Weinberger*:

> Surely, Congress contemplated that disputes between state agencies and government agencies could involve contract awards, such as the one at issue here. *Congress nevertheless set up an arbitration scheme instead of authorizing direct resort to federal court. As Justice Brandeis stated the "well settled" rule: "where a statute creates a right and provides a special remedy, that remedy is exclusive."* United States v. Babcock, 250 U.S. 328, 331, 39 S.Ct. 464, 465, 63 L.Ed. 1011 (1919) (citations omitted). Thus, where Congress has created an

Court's holding that an arbitration panel convened pursuant to 20 U.S.C. § 107d-1 "has no remedial powers whatsoever." *Maryland State Department of Education, Division of Rehabilitative Services v. U.S. Department of Education*, 896 F. Supp. 513, 517 (D. Md. 1995) (the District Court decision below). The Court of Appeals below further affirmed the District Court and held that an award of an arbitration panel convened under the Act to resolve a dispute between an SLA and a federal property manager could not be enforced in Federal Court. 98 F.3d at 168.

While the District Court below stated that it was clear that the Randolph-Sheppard Act applied to the DVA and the VCS (896 F. Supp. at 515, n.7), the District Court below nevertheless concluded:

> This Court finds itself in agreement with [the decision in *Nash*] . . . that '[a 20 U.S.C. § 107d-(b)] panel . . . [by] the Act's express terms, *has no remedial powers whatsoever*. It may determine that certain of the federal entity's acts violate the Act, but the Act leaves responsibility for remedying the violation to the federal entity itself.' *Georgia Department of Human Resources v. Nash*, 915 F.2d 1482, 1492 (5th Cir. 1990). [Emphasis supplied].

896 F. Supp. at 517. In affirming the decision of the District Court on October 22, 1996, the Court of Appeals below stated:

> While it may have been wiser for Congress to have provided for an automatic review of the remedial

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arbitration scheme as the administrative method for enforcing a statutory right, there is a strong presumption that it is exclusive [Emphasis supplied].

See, also, Delaware Department of Health and Social Services, 772 F.2d 1123 (3rd Cir. 1985); *Minnesota Department of Jobs & Training v. Riley*, 18 F.2d 681 (8th Cir. 1994); *Minnesota Department of Economic Security v. Riley*, 107 F.3d 648 (8th Cir. 1997). Other decisions to the same effect are cataloged at pp. 10-11 of the NFB's *Petition for a Writ of Certiorari*.

> steps taken by a federal entity in response to an arbitration decision, *the fact that Maryland is left without such a review* is not 'so gross as to shock the general moral or common sense.' [Emphasis supplied].

98 F.3d at 170-171.

The Trial Lawyers submit that the course charted by the Courts below and by the *Nash* Court, within the terms of *Mathews v. Eldridge, supra*, entails a very substantial "risk of an erroneous deprivation (424 U.S. at 335)" of the private civil and property rights of blind citizens who must work on Federal property. By contrast the "substitute procedural safeguards (424 U.S. at 335)" suggested by the Courts below and *Nash* hold little "probable value" because vesting authority to administer a remedy in the head of an offending federal agency in itself violates Procedural Due Process, as detailed by the NFB in its Petition. *NFB Petition for a Writ of Certiorari*, pp. 19-22.

C. The Government's Interest in Not Vesting Remedial Powers in Randolph-Sheppard Panels Is Insubstantial.

The DVA has not articulated any substantial reason why the arbitration panels should be without remedial powers, other than to say that such a conclusion is consistent with the holding in *Nash*. The DVA has suggested in the Court below that blind vending facilities may compete with the Veterans Canteen Service ("VCS"), and it has further suggested that a blind vending facility might compromise the integrity of VAMC's medical mission. However, whatever the objections of the DVA to a blind vending facility, there is no indication that the DVA ever attempted to obtain approval from the agency charged with administering the Randolph-Sheppard Act for the actions which it has taken in the case at bar under 20 U.S.C. § 107(b), which provides:

> Any limitation on the placement or operation of a vending facility based on a finding that such place-

> ment or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination along with supporting documentation, in the Federal Register.

Because the DVA has never even attempted to seek such approval, it is in a poor position to argue that the arbitration panel decision below is unreasonable. Indeed, as suggested in the Brief *Amicus Curiae* of the NCSAB in the case at bar, the more active involvement of the Secretary of Education under 20 U.S.C. § 107(b) may ameliorate any perceived problems with vesting remedial powers in panels convened under the Act and may well have made this present litigation unnecessary.

The refusal of the DVA to acknowledge the remedial powers of a 20 U.S.C. § 107d-1(b) panel is especially troubling when it is remembered: a) Congress mandated that state licensing agencies and federal property managers must cooperate to insure compliance with civil rights and other laws by blind vendors on Federal property. 34 C.F.R. § 395.35 and § 395.36; and b) At least in part, federal property managers such as the DVA have the right to exercise control over income belonging to blind vendors (34 C.F.R. § 395.32), which right obviously carries with it fiduciary responsibilities.

II. THE DISTRICT COURT DECISION, AFFIRMED BY THE COURT OF APPEALS BELOW, IS FUNDAMENTALLY FLAWED FROM THE PERSPECTIVE OF BOTH PROCEDURAL AND CONSTITUTIONAL LAW.

There are a host of respects in which the decisions of the Courts below are deficient and directly affect the Due Process rights of the blind.

The Trial Lawyers respectfully submit that the Courts below have misread and misapplied the provisions of the Administrative Procedure Act (APA) in the case at bar to the procedural and substantive detriment of the blind citizens who must make their living on Federal property. In order to place this argument in proper perspective, it is necessary to analyze the precise holding of the District Court below.

A. The District Court Did Not Dispose of This Case in a Manner Which Is Appropriate Under the Federal Rules of Civil Procedure or Permitted Under the Administrative Procedure Act.

The District Court was clearly frustrated by the failure of the MSDE and the DVA to reach a settlement in the case at bar. 896 F. Supp. at 515-516. The District Court noted that the MSDE had objected to a suggestion that the District Court hold a *de novo* evidentiary hearing, because only the arbitration panel could hold such a hearing. *Id.* Because of the MSDE's objection, the District Court did not hold a hearing, and did not remand this matter to the arbitration panel for a further evidentiary hearing.

The case was before the District Court on cross-motions for summary judgment. 896 F. Supp. at 515-516. The District Court, having been asked by the MSDE to review the arbitration decision under the APA, stated in this regard:

> . . . [W]hether this Court proceeds under the APA or under its equity powers, this Court runs into the same problem, namely that there exist relevant and material issues of disputed fact concerning whether the [DVA] Secretary's June 1, 1995 Order lacks a "rational basis" or that the Secretary's actions in issuing that Order were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. Sec. 706(2)(A).

Id. at 517-518.

The Trial Lawyers respectfully submit that the foregoing highlights two difficulties with the decision of the District Court.

First, the District Court granted summary judgment in favor of the DVA despite the fact that there were "relevant and material issues of disputed fact" which were unresolved in the case at bar. In so doing, the District Court disposed of this case in a manner that is inconsistent with one of the fundamental tenets of summary judgment procedure under Rule 56 of the Federal Rules of Civil Procedure. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). As Justices of this Court have observed, the Federal Rules of Civil Procedure are closely related to substantive rights and Procedural Due Process.[2] The manner in which the District Court disposed of the case at bar creates at least the appearance of judicial indifference to adherence to proper procedure when adjudicating the civil rights of the blind, and may have unintended consequences for those rights in other circumstances. While this Court is not primarily an error-correcting tribunal it should address such an impression of procedural indifference.

Second, and far more important, the District Court was manifestly confused about the Court's responsibility under the APA in the case at bar. Throughout its decision, the District Court was under the impression that it was being called upon to review the actions of the Secretary of Veterans Affairs under the APA. For example, after identifying the DVA as the author of a June 1, 1995 Order (896 F. Supp. 515), the District Court states, "Were this Court required to reach the APA issue, . . . this Court would find that the [MSDE] has not established

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[2] *See Dissent of Justices Black & Douglas* to the Order of January 21, 1963 Amending the Rules of Civil Procedure, and *Dissent of Justice Black* to the Order of February 28, 1966 Amending The Federal Rules of Civil Procedure, as reprinted in *Federal Civil Judicial Procedure and Rules*, pp. 29-34 (West 1997).

a) that the Secretary has acted in an 'arbitrary or capricious' manner or b) that the Secretary's June 1, 1995 Order otherwise violates Sec. 706 of the APA." 896 F. Supp. 517.

In fact, the APA review mandated by 20 U.S.C. § 107d-1(a) is for the action of the Secretary of Education, by and through the arbitration panel he convened under 20 U.S.C. § 107d-1. The Department of Education administers the Randolph-Sheppard Act, and the DVA is an administratee, not an administrator under the Act.

The District Court's error in concluding that the acts of the DVA Secretary are to be reviewed under the APA, undoubtedly helped move the Courts below and the *Nash* Court in the direction of concluding that it was and is the head of a federal agency who must administer and apply the remedy under the Act. According to the District Court:

> It is in that context that this Court finds itself in agreement with [*Nash*] Chief Judge Tjoflat's view that '[t]he [20 U.S.C. § 107d-1] (b) panel . . . under the Act's express terms, has no remedial powers whatsoever. It may determine that certain of the federal entity's acts violate the Act, but the Act leaves responsibility for remedying the violation to the federal entity itself.'

Id. at 517.

It is precisely the error of concluding that the actions of the DVA Secretary, instead of the actions of the Education Secretary, are the subject of APA review which the NFB addresses at pp. 20-22 of its *Petition for a Writ of Certiorari* in the case at bar. As the NFB argues, the decision of the Courts below have created a Constitutional problem where none existed before by finding that a party to an arbitration panel adjudication is to be the one who administers the remedy for a violation found to exist by that panel.

The Department of Education administers the Randolph-Sheppard Act, and the DVA is an administratee, not an administrator under the Act. Nor is this case subject to the analysis in *FTC v. Cement Institute*, 333 U.S. 683 (1948), where the Court endorsed an administrative procedure that included the opportunity to produce evidence, testimony, cross-examination and argument to the decision maker.

B. The Decisions of the District Court and the Court of Appeals Below Effectively Have Closed the Courthouse Doors to Judicial Review of a Randolph-Sheppard Arbitration Panel Decision.

To the *Amici* it is inconceivable that the Courts below have effectively closed the courthouse doors completely to an SLA's efforts, to vindicate the rights of the blind by seeking judicial review in Federal Court.

A decision such as the one below disregards entirely the clear and obvious mandate of 20 U.S.C. § 107d-2(a), which latter provision provides in pertinent part that an arbitration panel convened under the Act:

> . . . shall, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision *which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5.* [Emphasis supplied].

This Court has made it clear that under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, a party aggrieved or adversely affected by a final agency action has an almost absolute right to judicial review of such an action. In *Abbott Laboratories v. Gardner*, 387 U.S. 1339-41 (1967), this Court observed:

> [A] survey of our cases shows that judicial review of a final agency action will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress . . . discretion, 5 USC § 701(a).

> . . . The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court,' 5 USC § 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. Shaughnessy v Pedreiro, 349 US 48, 51, 99 L ed 868, 873, 75 S Ct 591; see United States v Interstate Commerce Comm'n, 337 US 426, 433-435, 93 L ed 1451, 1459, 1460, 69 S Ct 1410; Brownell v Tom We Shung, supra; Heikkila v Barber, supra. Again in Rusk v Cort, supra, 369 US at 379-380, 7 L ed 2d at 816, 817, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the court's restrict access to judicial review.

In refusing to enforce the decision of the arbitration panel in the case at bar, the Court below closed the courthouse doors to judicial review of a final agency action, which is directly contrary to the settled practice of this Court.

In the case of arbitration panels convened pursuant to 20 U.S.C. § 107d-1, there is "persuasive," indeed irrefutable, reason to believe that Congress intended that the award of such a panel would be subject to judicial review. The decision of the Court below not only effectively denies blind citizens Procedural Due Process; it is directly contrary to what this Court has recognized as the policy of Congress in enacting legislation:

> 'Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or

> to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.' S Rep No. 752, 79th Cong., 1st Sess, 26 (1945).

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 671 (1945).

This Court has stated that where substantial doubt about Congressional intent exists, the general presumption favoring judicial review of administrative action is controlling. Here, there is manifest evidence that Congress specifically intended that the final agency actions of the Secretary of Education, by and through the arbitration panels convened under the Act, were to be reviewable under the APA, as is clear from the face of 20 U.S.C. § 107d-2(a).

III. AS MATTERS STAND, IT WOULD BE PREFERABLE TO HAVE A JUDICIAL REMEDY FASHIONED BY THIS COURT RATHER THAN HAVE THE RIGHTS OF THE BLIND SUBJECT TO A DEFECTIVE ARBITRATION PROCEDURE.

The blind are either forced to endure unending litigation such as that in the Eighth Circuit [8] or must face the prospect of having no effective and efficient method to redress their rights, as is the case under the decisions of the Courts below and *Nash*. The *Amici* submit that it would be better for this Court to fashion a remedy for the blind, as it did for the victims of sex discrimination in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), than to allow the civil rights of the blind to be thus abused.

In *Senate Report 93-937*, p. 20 (J.A. 157), the Committee on Labor and Public Welfare stated as follows, in a section entitled "Arbitration and Judicial Review:"

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[8] *Minnesota Department of Economic Security v. Riley*, 107 F.3d 648 (8th Cir. 1997).

> The bill creates two new sections of the Act which establish the machinery for a *grievance resolution procedure*. . . . The Committee considers the arbitration procedures contained in S. 2581 to be valuable tools for the *resolution of disputes*. Under current circumstances, machinery for *prompt and satisfactory disposition* of blind licensee and state agency *complaints* does not exist. . . . The Comptroller General's Report [reproduced in full in the Addendum to this Brief] states that HEW and state agencies are still *without recourse* from decisions of federal agencies regarding blind vendor facilities on property they control. Moreover, *blind vendors have attempted to bring their grievances to the judicial system* for resolution. In the case of *Wilson v. Blount*, for example, the U.S. District Court . . . held that the plaintiff blind vendor had no standing to challenge the legal basis of the decision of the Postmaster General. . . . *It is the expectation of the Committee that the arbitration and review procedures adopted in S. 2581 will provide the means by which aggrieved vendors and state agencies may obtain a final and satisfactory resolution of disputes.* [Emphasis supplied].

What has happened in the Eighth Circuit cannot be characterized in any sense as a prompt and satisfactory disposition of the blind vendor's grievances in that case.[4] What happened in the case at bar likewise cannot be characterized as a superior method of achieving a final and satisfactory resolution of a dispute under the Act. If the efforts of Congress to achieve a fair hearing for blind citizens who must make their living on Federal mandates concerning Procedural Due Process, were insuffi-

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[4] "Nine years later, the [Veterans Administration] is still at it, demanding the right to install machines that would, as the district found, destroy the blind vendor's livelihood. It is time for the [Veterans Administration's] scorched-earth campaign to end." *Minnesota Department of Economic Security v. Riley*, 107 F.3d 648 (8th Cir. 1997).

cient, then perhaps this Court can find some other way to vouchsafe the personal civil rights and property rights of blind citizens who must make their living on Federal property.

CONCLUSION

Based on the foregoing the *Amici* respectfully request that the Court grant the Petition for Writ of Certiorari of the National Federation of the Blind and Maryland State Department of Education, Division of Rehabilitation Services.

Respectfully submitted,

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Nos. 96-1550 and 96-1551

In the Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
FILED
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THE NATIONAL FEDERATION OF THE BLIND, *et al.*,
Petitioners,
v.
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

MARYLAND STATE DEPARTMENT OF EDUCATION,
Petitioner,
v.
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICI CURIAE* COMMONWEALTH OF VIRGINIA AND STATES OF COLORADO, ILLINOIS, MISSISSIPPI AND RHODE ISLAND IN SUPPORT OF PETITIONERS

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BRIEF FOR *AMICI CURIAE* COMMONWEALTH OF VIRGINIA AND STATES OF COLORADO, ILLINOIS, MISSISSIPPI AND RHODE ISLAND IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI*

The Virginia Department for the Visually Handicapped (DVH) is a State licensing agency under the Randolph-Sheppard Act, 20 U.S.C. §§ 107, *et seq.* (the "Act").

Each such state licensing agency is responsible for licensing blind vendors seeking positions in federal installations in its state and for protecting the interests of those vendors in seeking such positions.[1] *See generally* 20 U.S.C. §§ 107b, 107b-1; 34 C.F.R. §§ 395.4, 395.5, 395.6.

The Act allows a State licensing agency, if it determines that a federal host agency is failing to comply with the Act or its regulations, to "file a complaint with the Secretary [of Education,] who shall convene a panel to arbitrate the dispute." 20 U.S.C. § 107d-1(b). The Act also provides that "the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter." *Id.* Congress intended by that provision to create a plain, speedy, and inexpensive remedy for the resolution of disputes betwen State licensing agencies and federal host agencies arising under the Act.

By holding that such arbitration panels (herein, "RSA arbitration panels") have no remedial authority, the decision below (*Maryland State Department of Education v. U.S. Department of Veterans Affairs*, 98 F.3d 165 (4th Cir. 1996)) renders that remedy illusory. If that decision remains the law in the Fourth Circuit, the mission of the Virginia Department for the Visually Handicapped will by hampered severely—both because recalcitrant federal agencies will be able to postpone the final resolution of disputes, virtually *ad infinitum*, and because the costs of pursuing such resolutions will be multiplied several times over. The States of Colorado, Illinois, Mississippi and Rhode Island join Virginia in seeking review, because they are concerned that the Fourth Circuit decision, if not corrected, could be followed by federal courts in their own jurisdictions to the prejudice of their own programs for licensing blind vendors.

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[1] Currently, there are 58 blind vendors licensed by Virginia on federal properties, 22 by Colorado, 39 by Illinois, 13 by Mississippi, and 4 by Rhode Island.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision holds that an RSA arbitration panel has no remedial authority and no authority to do anything other than "determine whether the federal entity is in violation of the Act." 98 F.3d at 169. It acknowledges and does not challenge Maryland's contention that under its reading of the Act, "a federal entity can simply refuse to remedy the violations found by a § 107d-1(b) panel," *id.* at 170, leaving it up to the State agency to "file another complaint with the Secretary and have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance with the Act," *id.* at 171. It thus remits enforcement of the Act, and of RSA arbitration panel decisions, to the federal agencies that have violated the Act; and it leaves enforcement of blind vendors' substantive rights to "priority" in the operation of vending facilities on federal property to the federal agencies that have violated those rights. In short, it renders the Act a toothless, unenforceable statement of aspirations. It does so by focusing narrowly on a single provision of the Act, by construing the ambiguous language of that provision as plain, and by construing that ambiguous language in a way that is contrary to the intent of Congress as manifested by the Act's language, purposes, functions and history.

The decision below is in conflict with a recent decision of the Eighth Circuit, and it reflects a deeper confusion among the lower courts regarding the proper interpretation and application of the arbitration provisions of the Act. The question presented also is of critical importance to the functioning of the Randolph-Sheppard Act, a statute that Congress enacted to provide many of our blind citizens a means of supporting themselves and becoming productive citizens and taxpayers, both for the benefit of themselves and for the good of our Nation as a whole. To settle the inter-Circuit conflict, and to hasten the demise

of an erroneous decision which now governs Randolph-Sheppard Act arbitration proceedings throughout the Fourth Circuit, the *amici* States urge the Court to grant the petitions in this case.

ARGUMENT

I. THE RANDOLPH-SHEPPARD ACT AND THE FOURTH CIRCUIT DECISION

Congress enacted the Randolph-Sheppard Act in 1936, "to 'provid[e] blind persons with remunerative employment, enlarg[e] the economic opportunities of the blind, and stimulat[e] the blind to greater efforts in striving to make themselves self-supporting.'" 98 F.3d at 167, quoting 20 U.S.C. § 107(a). It assigned "priority . . . to blind persons licensed by a State agency" in the "operation of vending facilities on Federal property." *Id.*, § 107(b). The Secretary of Education ("Secretary") administers the Act and is charged to issue regulations "to assure that . . . (1) the priority under this subsection is given to such licensed blind persons . . . and (2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States." *Id.*

As originally enacted, § 107 simply "authorized" blind persons licensed by State agencies under the Act to operate vending stands on federal property. It was amended in 1954 to give blind persons licensed under the Act a new "preference" in such assignments, and to charge each department or agency in control of federal property to "prescribe regulations designed to assure such preference . . . without *unduly inconveniencing* such departments and agencies *or* adversely affecting the interests of the United States." Pub. L. No. 83-565, Ch. 655, 68 Stat. 663 (emphases added).

The 1974 amendments were enacted in response to extensive evidence that the blind vending stand program

"has not developed, and has not been sustained in the manner and spirit in which the Congress intended at the time of its enactment." Pub. L. No. 93-516, § 202, 88 Stat. 1623 (Congressional findings). Among other things, the legislative record shows that some federal agencies chronically resisted the requirements of the Act, often due to the competing interests of employee benefit organizations, and that they were able to evade those requirements because the Act lacked any effective enforcement mechanism. *See, e.g., Randolph-Sheppard Act for the Blind Amendments of 1973, Hearings Before the Subcommittee on the Handicapped of the U.S. Senate Committee on Labor and Public Welfare, 93d Cong., 1st. Sess., on S. 2581,* at 20, 23, 24-27, 31-32, 68-73, 303-04.

The 1974 amendments made other changes in § 107, whose earlier history is discussed above. These amendments divided § 107 into subsections, and in § 107(b) they (1) changed the "preference" to a "priority"; (2) centralized the duty to promulgate regulations in the Secretary; (3) deleted the exemption for cases that would "unduly inconvenienc[e]" host agencies; (4) ordered that "[a]ny limitation" on a vendor facility based on a host agency's finding that it would adversely affect the interests of the United States "*shall be fully justified in writing* to the Secretary, who *shall determine* whether such limitation is justified"; and (5) made such determinations "binding" on host agencies. (Emphasis added.)

The 1974 amendments also added several new sections, including 20 U.S.C. §§ 107d-1 and 107d-2, the sections most directly at issue here. Those sections create two new, largely parallel enforcement mechanisms, governed by §§ 107d-1(a) and (b) and procedurally by § 107d-2. Subsection (a) of § 107d-1 allows any blind licensee to submit disputes with a State licensing agency for an evidentiary hearing before that agency; and if the licensee is dissatisfied with its action "he may file a complaint with the Secretary who shall convene a panel to arbitrate the dis-

pute pursuant to section 107d-2 . . ., and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter." Subsection (b) of § 107d-1 similarly provides that a State licensing agency which determines that a federal host agency is failing to comply with the Act or its regulations "may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2"; and again, "the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

Section 107d-2 governs procedure in arbitrations under § 107d-1, including (a) notice and hearing, (b) composition of the panel and "termination of violations," (c) publication of panel decisions in the Federal Register, and (d) payment of costs by the Secretary. Section 107d-2(a) provides that an RSA arbitration panel decision "shall be subject to appeal and review as a final agency action" under the Administrative Procedure Act (APA).

There is one significant distintion, however, between arbitrations requested by blind licensees, under § 107d-1(a), and arbitrations requested by State licensing agencies, under § 107d-1(b): Section 107d-2(b) provides for "termination of violations" (subsection caption) in cases under § 107d-1(b) but *not* in cases under § 107d-1(a).[2] The distinction most likely reflects the different origins of such cases. Section 107d-1(b) provides for arbitration when "any State licensing agency determines that any department, agency, or instrumentality of the United States . . . is *failing to comply with the provisions of this Act or any regulations issued thereunder*" (emphasis added). Section 107d-1(a), on the other hand, authorizes

[2] Specifically, § 107d-2(b)(2) provides that if the arbitration panel finds the federal agency in violation of the Act or its regulations, the head of the agency "shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel." There is no corresponding provision applicable to arbitrations under § 107d-1(a).

arbitration when a blind licensee is "dissatisfied with any action arising from the operation or administration of the vending facility program." In other words, Congress enacted § 107d-1(b) to create a remedy for federal agency recalcitrance—an issue that does not arise with State licensing agencies.

The Fourth Circuit opinion cites broadly and quotes at length from *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482, 1487-95 (11th Cir. 1990) ("*Nash*"), a case under § 107d-1(a) (and not § 107d-1(b), at issue here), and especially *dicta* in *Nash*;[3] but its reading of the statute focuses narrowly on the portion of subsection (b)(2) of § 107d-2 which states that if an RSA arbitration panel finds a federal host agency in violation of the Act or its regulations, the head of that agency "shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel." *Id.*, quoted in opinion below, 98 F.3d at 169. Based on that provision and on *Nash*, the Fourth Circuit held that RSA arbitration panels have no remedial powers at all: "a § 107d-

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[3] The question in *Nash* was whether a blind vendor may recover compensatory damages under 20 U.S.C. § 107d-1(a), against a State licensing agency, for that agency's failure to take action against a federal entity. *See Nash*, 915 F.2d at 1484; opinion below, 98 F.3d at 170. This case, unlike *Nash*, arose under 20 U.S.C. § 107d-1(b) and not § 107d-1(a); it involves a State licensing agency's remedies against a federal agency and not a vendor's possible remedies against a State licensing agency; and it does not involve any claim for damages.

The *Nash* decision includes an "extensiv[e]" discussion of the possible remedial powers of a § 107d-1(b) panel and other issues not presented in that case. Opinion below, 98 F.3d at 170, citing *Nash*, 915 F.2d at 1487-95. Judge Clark's dissent in *Nash* criticized that discussion as both erroneous and unecessary. *See Nash*, 915 F.2d at 1501. We agree. We need not now address the merits of the Eleventh Circuit's decision under § 107d-1(a); but the procedural and factual distinctions between the two cases, discussed above, and the remedial distinction between § 107d-1(a) and § 107d-1(b), discussed in the text, warrant a highly skeptical approach to the *Nash* court's *dicta* regarding the latter.

1(b) arbitration panel will determine whether the federal entity is in violation of the Act, while the head of the federal entity will remedy the violation." *Id.*

Under the Fourth Circuit's interpretation, "a federal entity can simply refuse to remedy the violations found by a § 107d-1(b) panel," *id.* at 170, and a State agency's only remedy is to "file another complaint with the Secretary and have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance with the Act," *id.* at 171. A third RSA arbitration panel presumably could be convened to review the agency's response to the second decision; and so, on and on, potentially *ad infinitum*. *Cf. Minnesota Dept. of Jobs and Training v. Riley*, 107 F.3d 648, 650 (8th Cir. 1997) ("*Riley II*") (after nine years of resisting the requirements of the Act, "[i]t is time for the [Veterans Canteen Service]'s scorched-earth campaign to end"). In short, in the Fourth Circuit, host agencies that violate the Act are "vested with the responsibility to end the acts found in violation," 98 F.3d at 170; and State licensing agencies' only remedy for host agency recalcitrance is a potentially endless cycle of non-final arbitration proceedings.

II. THE FOURTH CIRCUIT'S DECISION IGNORES MUCH OF THE LANGUAGE OF THE ACT AND IS CONTRARY TO CONGRESS' INTENT

As discussed above, the Fourth Circuit opinion focuses broadly on *Nash* and narrowly on the charge given by § 107d-2(b)(2) to heads of federal agencies that have violated the Act—to "cause such acts or practices to be terminated promptly and [to] take such other action as may be necessary to carry out the decision of the panel." It concludes that RSA arbitration panels can decide *only* "whether a federal entity's acts 'are in violation' of the Act"; they cannot "order the federal entity to take any remedial action." 98 F.3d at 170, quoting *Nash*, 915 F.2d at 1492.

The Fourth Circuit's interpretation is not merely "cumbersome," 98 F.3d at 171. It is wrong. It construes ambiguous statutory language as plain, in a way that is contrary to Congress' intent as manifested by the Act's purposes, functions and history, and that ignores the meaning of other provisions of the same Act. Subsection (b)(2) of § 107d-2 is not written in "plain language," as stated in the Fourth Circuit opinion. It is capable of two different readings, and the Fourth Circuit overlooked the reading that best effectuates the purposes of the statute and the plain meaning of the statute, and which best functions together with its remaining parts.

Section 107d-2(b)(2) requires the heads of federal agencies to "cause such [violations] to be terminated promptly" and to take "other action . . . to carry out" RSA arbitration panel decisions. Agency heads naturally have that responsibility; but that does not detract from the remedial authority of the RSA arbitration panels. Congress quite naturally did not create a "Randolph-Sheppard Police Force" with authority to move into federal agencies' executive suits and direct agency personnel in carrying out RSA arbitration panel decisions; it gave that responsibility to the officers in charge of the agencies. The language charging federal agency heads to "cause" violations "to be terminated promptly" means nothing other than that. The requirement that federal agencies "take such *other action* as may be necessary to *carry out the decision of the panel*" (emphases added), however, goes further; if an arbitration panel may do nothing more than determine that a federal agency is violating the Act, as the Fourth Circuit has held, then there is nothing *to* "carry out" (*i.e.*, to implement, or to execute)[4] and that provision is meaningless.

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[4] The *New Lexicon Webster's Dictionary* (New York 1988) defines "carry out" as "to fulfill, put (orders, etc.) into effect." *Webster's New World Dictionary of the American Language* (New York 1966) defines "carry out" as "1) to put (plans, instructions, etc.) into practice. 2) to get done; bring to completion; accom-

At a *minimum*, the reading presented above is a plausible interpretation of the statutory language that contradicts the "plain meaning" interpretation in the Fourth Circuit opinion—*i.e.*, it demonstrates that the statute is ambiguous. It therefore is proper to turn to other traditional tools of statutory construction, such as the Act's purposes, history, structure, and the working of the statute as a whole.

The Fourth Circuit's focus on the seemingly "plain" language of § 107d-2(b)(2) obscured its view of the remainder of §§ 107d-1 and 107d-2, which provide for appointment of panels to "arbitrate" disputes and authorize those panels to issue "decision[s]" that are "final and binding" and "subject to appeal and review as a final agency action" under the APA. Congress did not intend for the words "arbitrate" or "decision" or "final and binding" to mean something unique in this Act—a "decision" limited to findings of violation, made by an "arbitrat[ion]" panel without power to remedy the violation. It referred to a decision that left nothing to be done but for the agency head to implement the remedy ordered by that decision. Likewise, when Congress provided for judicial review of RSA panel decisions as "final agency action[s]" under the APA, it had in mind the traditional concept of finality that applies in that context. *See infra* at 12-13.

As noted in the Fourth Circuit's opinion, the Act is a labor and employment statute, enacted "to 'provid[e] blind persons with remunerative employment,'" enlarge their economic opportunities, and assist them in becoming more self-supporting. 98 F.3d at 167. In fact, the structure of the Act, and particularly the Secretary's regulations, share a number of characteristics in common with

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plish." Merriam-Webster's WWWebster Dictionary (Internet URL http://www.m-w.com/netdict.htm) similarly defines "carry out" as "1: to put into execution <carry out a plan> [;] 2: to bring to a successful issue: COMPLETE, ACCOMPLISH <you will be paid when you have carried out the assignment> . . . ."

federal labor law.[5] It therefore is not surprising that when Congress decided in 1974 that the Act required new tools for enforcement, it turned to the arbitration mechanism that had proved so successful in resolving disputes in conventional labor-industrial relationships.

A lengthy discussion of federal labor arbitration law is not needed. This Court knows well that in *any* form of "arbitration" known to Congress in 1974, arbitration panels had authority to order remedies for violations of the governing standard (for example, a collective bargaining agreement), and that with rare exceptions, their decisions were final.[6] There is no basis for an assumption that Congress intended a different meaning in the Randolph-Shepard Act. *See Delaware Dept. of Health and Social Services v. U.S. Dept. of Education*, 772 F.2d 1123, 1130 (3rd Cir. 1985): "Except for the unique

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[5] The Act and regulations authorize State licensing agencies to set aside funds from vending facility proceeds for "[t]he establishment . . . of retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time . . ." 34 C.F.R. § 395.9(5); *see* 20 U.S.C. § 107b(3)(E). State licensing agencies must provide vocational and other training services to blind vendors, including on-the-job training in all aspects of vending facility operation. 34 C.F.R. § 395.11. In effect, a blind vendor operates a small business in partnership with a State licensing agency. *See generally* 20 U.S.C. § 107b; *cf.* 34 C.F.R. §§ 395.4, 395.6, and 395.7.

[6] *See generally, e.g., United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *La Vale Plaza v. Noonan*, 378 F.2d 569, 572 (3rd Cir. 1967) ("[t]he general principle in a common law arbitration is that the arbitrators are the final judges of both the facts and the law and their decision will not be disturbed for a mistake of fact or of law"); *Gramling v. Food, Machinery & Chemical Corp.*, 151 F. Supp. 853, 857 (W.D. S.C. 1957) (reciting the "'settled rule that courts will not review the findings of law and fact contained in an award, and will never undertake to substitute their judgment for that of the arbitrators.' Any other rule would make an award the commencement, not the end, of litigation").

judicial review provision, there is no indication . . . that Congress used the term arbitration in any manner different from its conventional usage in other contexts."

The Fourth Circuit opinion, however, assumes implicitly that the Act uses the word "arbitrate" to mean something different from what it ever has meant before. Ample case law demonstrates that a court should not indulge in such an assumption unless compelled to do so. *See, e.g., NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms"); *FDIC v. Meyer*, 510 U.S. 471, ——, 114 S. Ct. 996, 1001 (1994) ("In the absence of . . . a definition [in the statute], we construe a statutory term in accordance with its ordinary or natural meaning").

The Fourth Circuit's decision also is contrary to the portion of 20 U.S.C. § 107d-2(a) which provides that an RSA arbitration panel "decision . . . shall be subject to appeal and review as a final agency action" under the APA. Under the Fourth Circuit's opinion, an RSA arbitration panel's decision is not final, not enforceable, and not reviewable, under the APA or otherwise. It is merely a finding of a violation and a prelude to a new round of equally-inconclusive arbitration. Finality, enforceability, and reviewability all are left to the violator to resolve. A State agency (or its licensee) is not "aggrieved" by an RSA panel "decision" that finds a violation, and therefore it cannot obtain review of that decision (5 U.S.C. § 702). It will be aggrieved in some cases by host agencies' failures to comply with the Act *despite* an RSA arbitration's panel findings; but the only review of those failures is not under the APA, but to "have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance with the Act." 98 F.3d at 171.

At least in some cases, the result of the Fourth Circuit's holding will be an endless series of advisory decisions. State licensing agencies will have no means to enforce the Act against federal agencies. Congress acted to create a mechanism for "prompt and satisfactory disposition of blind licensee and state agency complaints" (S. Rep. No. 93-937 at 20, *reprinted in* 1974 U.S.C.C.A.N. 6373); the Fourth Circuit has taken it away.

The Fourth Circuit opinion concedes that "it may have been wiser for Congress to have provided for an automatic review of the remedial steps taken by a federal entity," but it concludes that leaving States without such a review is not " 'so gross as to shock the general moral or common sense.' " 98 F.3d at 170-71, *quoting Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). In our view, the fact that State licensing agencies are left without an effective means of seeking judicial enforcement of the decisions of RSA arbitration panels does "shock the general moral or common sense"; *and* it is contrary to the express will of Congress.

The Fourth Circuit's decision flies in the face of its recognition that "Congress enacted the Act to 'provid[e] blind persons with remunerative employment, enlarge[e] the economic opportunities of the blind, and stimulat[e] the blind to greater efforts in striving to make themselves self-supporting' " (98 F.3d at 167, quoting 20 U.S.C. § 107(a)), because it creates a broad avenue for recalcitrant federal agencies to frustrate (or at best to delay severely) the efforts of State licensing agencies to provide such employment. Its decision is even more clearly contrary to its acknowledgment "that Congress enacted the remedial provisions of the Act to 'provide the means by which aggrieved vendors and State agencies may obtain a final and satisfactory resolution of disputes.' " 98 F.3d at 171, quoting 1974 legislative history. According to the Fourth Circuit, the wrongdoer is left to police his own wrong; neither a blind licensee nor a State

licensing agency may enforce the Act against an obstinate federal agency. Their only recourse is to engage in endless, unenforceable "arbitrations"—prevailing in theory, aggrieved in fact but not in law, without a final order, unable to obtain judicial enforcement or review.

As the Eleventh Circuit panel's majority stated in *Nash*, this construction leaves State agencies and blind vendors "no substantive right" and "no substantive remedy"—only a "procedural right to complain" that is almost "empty." 915 F.2d at 1488. That is entirely inconsistent with the intent of Congress, as expressed in both the legislative history (*see, e.g., Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 101-03 (D.C. Cir. 1986); National Federation of the Blind's Petition for Certiorari at 23) and the language of the Act.

III. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE AN INTER-CIRCUIT CONFLICT

In *Riley II*, 107 F.3d 648, the Eighth Circuit affirmed a district court order "which granted Minnesota's motion to enforce [an RSA arbitration] Panel's decision" that the Veterans Canteen Service (VCS) is subject to the Randolph-Sheppard Act and does not have the right to install and operate vending machines to compete with a Randolph-Sheppard Act licensee. *Id.* at 649. The Eighth Circuit took the position that its decision was not in conflict with the decision in this case (or with the Eleventh Circuit's decision in *Nash*, 915 F.2d 1482), because the arbitration panel "never ordered the VCS to take any remedial action, but simply decided competing VCS vending machines at the VA Medical Center would violate the Act." *Riley II*, 107 F.3d at 650.

We respectfully disagree. The district court in *Riley* entered an "enforcement order," *id.* at 649, which it characterized as a preliminary injunction; but the Eighth Circuit "agree[d] with the VCS that, for the purpose

of review, [it] should treat the order as a permanent injunction." *Id.* It appears quite clear that under *Riley II*, if a federal agency refuses to implement an RSA arbitration panel's award, a State licensing agency may obtain an injunction in a federal district court enforcing the award. But in the Fourth Circuit, under the decision below, there is no "automatic review of the remedial steps taken by a federal entity in response to an arbitration decision"—a State licensing agency's only remedy is to "file another complaint with the Secretary and have a second arbitration panel determine whether the federal entity's acts in response to the first decision bring it into compliance with the Act." Opinion below, 98 F.3d at 171.

The conflict seems clear, and it is not likely to go away by itself. Decisions under § 107d-1(a) (such as *Nash*, 915 F.2d 1482 (11th Cir. 1990), *Delaware Dept. of Health and Social Services v. U.S. Dept. of Education*, 772 F.2d 1123 (3rd Cir. 1985), and *Hudson v. Boxer*, 632 F. Supp. 1569 (D. Colo. 1986)) are not directly pertinent to the issues presented by this case, but they also reflect a deep confusion among the lower courts as to the proper interpration and application of the arbitration provisions of the Act. The current status of the law is that (1) in the Third Circuit (*see Delaware Dept. of Health*), a blind licensee may recover compensatory damages and attorneys' fees in an arbitration against a State licensing agency under § 107d-1(a); (2) in the Eleventh Circuit (*see Nash*)—and probably in the Fourth Circuit, in view of its reliance on *Nash* in the decision below—an RSA arbitration panel may not grant *any* form of relief in an arbitration under the same statute; (3) in the Fourth Circuit (*see* decision below), a § 107d-1(b) arbitration panel has no remedial authority and a district court may not enforce its decision; and (4) in the Eighth Circuit (*see Riley II*), the remedial authority of a § 107d-1(b) arbitration panel is not clear, but it *is* clear that a district court

may enter an injunction enforcing a panel's decision; and (5) at least in Colorado (*see Hudson*), blind vendors may obtain a preliminary injunction against State officials to maintain the status quo pending arbitration. Other filings in this case document the fact that other lower courts have faced similar issues as well, with similarly inconsistent results.

Finally, the issue is of critical importance to the effective functioning of the Randolph-Sheppard Act and of State licensing agencies established under that Act. As noted at the outset, if the Fourth Circuit's decision is the law, the ability of State licensing agencies to accomplish their missions will be hampered severely—because a federal agency that is disinclined to comply with the Act or with an arbitration award will be able to postpone its compliance indefinitely, and because the costs to State licensing agencies of seeking such compliance will be multiplied several times over. The ultimate losers, of course, will not be the State licensing agencies or the taxpayers who support them. The greatest losers will be the blind citizens of our Nation, who will be denied the opportunities that Congress gave them when it enacted and amended the Act—the opportunities to achieve remunerative employment, to support themselves, and to increase their actual and personal sense of dignity and value to themselves and their communities.

CONCLUSION

The Commonwealth of Virginia and the States of Colorado, Illinois, Mississippi, and Rhode Island respectfully submit that the Court should grant the petitions for certiorari and reverse the judgment below.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS, ET AL.

NATIONAL FEDERATION OF THE BLIND, ET AL., PETITIONERS

v.

DEPARTMENT OF VETERAN AFFAIRS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an arbitration panel convened under the Randolph-Sheppard Act, 20 U.S.C. 107d-1(b), 107d-2(b)(2), to resolve a dispute between a state licensing agency and a federal entity, may go beyond determining whether a statutory violation occurred and order a federal entity found to be in violation of the Act to take specific remedial action.

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MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES, PETITIONER

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a)[1] is reported at 98 F.3d 165. The opinion and order of the district court (Pet. App. 17a-31a) are reported at 896 F. Supp. 513. The arbitration panel's final

[1] References to "Pet. App." are to the appendix to the petition in No. 96-1550.

award (Pet. App. 40a-45a) and its earlier opinion and award (Pet. App. 32a-39a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1996. Petitions for rehearing were denied on December 31, 1996. Pet. App. 15a-16a. The petition for a writ of certiorari in No. 96-1551 was filed on March 28, 1997. The petition for a writ of certiorari in No. 96-1550 was filed on March 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises under the Randolph-Sheppard Act, 20 U.S.C. 107-107f, a cooperative federal/state program for licensing, training and placing qualified blind persons as operators of vending facilities on federal property. The Act provides that, "[i]n authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency." 20 U.S.C. 107(b). Under the Act, the design for every newly constructed federal government building must include a satisfactory site for a Randolph-Sheppard Act vending facility. 20 U.S.C. 107a(d)(1). The Act charges the Secretary of Education with responsibility for interpreting and enforcing its provisions, including prescribing regulations to ensure that, "wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility * * * would not adversely affect the interests of the United States." 20 U.S.C. 107(b)(2); see 20 U.S.C. 107a(a). "Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would

adversely affect the interests of the United States shall be fully justified in writing to the Secretary [of Education], who shall determine whether such limitation is justified." 20 U.S.C. 107(b).

The Act is implemented in the various States by state agencies that are selected by the Secretary to act as licensing agencies. 20 U.S.C. 107a(a)(1), 107b. State licensing agencies are authorized to, *inter alia*, issue licenses and select the location and type of vending facility at a federal property, with the approval of the head of the federal entity controlling the property. 20 U.S.C. 107a(a)(5), 107a(c). A state licensing agency applies to the appropriate federal entity for a permit to establish a site for a licensed blind vendor on federal property. 20 U.S.C. 107a(c); 34 C.F.R. 395.16. Selected vendors earn income from the profits of the vending facilities they operate and from a fund established under the statutory scheme. 20 U.S.C. 107a(a)(1), 107b(3)(D), 107d-3.

The Act further provides that, if a state licensing agency determines that a federal entity that controls federal property is failing to comply with the provisions of the Act or regulations issued thereunder, the state licensing agency may file a complaint with the Secretary of Education. 20 U.S.C. 107d-1(b). Upon receipt of such a complaint, "the Secretary shall convene an ad hoc arbitration panel" to arbitrate that dispute. 20 U.S.C. 107d-1(b), 107d-2(a). The arbitration panel consists of three members, including one person designated by the state licensing agency, one person designated by the head of the federal entity controlling the federal property over which the dispute arose, and one person jointly designated by the first two members. 20 U.S.C. 107d-2(b)(2). If a party fails to designate a panel member, the Secre-

tary of Education designates a member on the party's behalf. 20 U.S.C. 107d-2(b)(2). The panel must, in accordance with certain provisions of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, "give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action" for purposes of the APA. 20 U.S.C. 107d-2(a). If the panel finds that "the acts or practices" of the federal entity are in violation of the Act or regulations issued thereunder,

> the head of any such * * * agency * * * shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

20 U.S.C. 107d-2(b)(2).[2]

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[2] Under the statutory scheme, federal agencies do not have a direct relationship with the blind licensees. If a blind licensee is "dissatisfied with any action arising from the operation or administration of the vending facility program," the licensee may obtain a full evidentiary hearing before the state licensing agency. 20 U.S.C. 107d-1(a). If the licensee is dissatisfied with "any action taken or decision rendered as a result of such hearing," the licensee may file a complaint with the Secretary, who must convene a panel under Sections 107d-1(a) and 107d-2(b)(1), to arbitrate the dispute. That panel consists of three persons, one designated by the state licensing agency, one designated by the blind licensee, and one designated by the first two members. 20 U.S.C. 107d-2(b)(1). As under Section 107d-2(b)(2), the Secretary designates a member if a party fails to do so. *Ibid.* Like an arbitration panel designated under Section 107d-2(b)(2) to resolve a dispute between a federal entity and a state licensing agency, the arbitration panel must, in accordance with certain provisions of the APA, "give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action" for purposes of the APA. 20 U.S.C. 107d-2(a). Unlike the procedure under Section

2. Petitioner in No. 96-1550, the Maryland State Department of Education, Division of Rehabilitation Services, is designated as the state licensing agency under the Randolph-Sheppard Act in the State of Maryland. Petitioners in No. 96-1551 are the National Federation of the Blind and Donald J. Morris, a blind individual residing in the State of Maryland.[3]

In 1987, respondent, the Department of Veterans Affairs,[4] began construction of the Veteran Affairs Medical Center in Baltimore, Maryland. Petitioner was not afforded notice of the construction as required under the Act, 20 U.S.C. 107a(d)(1), but it learned of the project and applied to respondent for a permit in December 1991 to operate a Randolph-Sheppard Act vending facility at the new VA center. Pet. App. 5a, 18a. Respondent denied the request, and petitioner filed a complaint with the Secretary of Education for arbitration pursuant to Sections 107d-1(b) and 107d-2(b)(2). *Id.* at 5a.

After a hearing, the arbitration panel issued an order on May 5, 1994, rejecting respondent's conten-

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107d-2(b)(2), however, Section 107d-2(b)(1) is silent regarding any limitations on the panel's authority to remedy violations.

[3] The petitioners in No. 96-1551 were not parties in the district court proceedings, but the National Federation of the Blind filed a brief as *amicus curiae* supporting the Maryland State Department of Education, Division of Rehabilitation Services, in the court of appeals. Both petitioners in No. 96-1551 became intervenors in the court of appeals for purposes of filing a petition for rehearing with suggestion of rehearing en banc. Pet. App. 15a-16a. References to "petitioner" in the singular refer to the petitioner in No. 96-1550.

[4] Petitioner brought this action against the Department of Veterans Affairs and several officials of that Department, all of whom we refer to collectively as respondent.

tion that the Act should not apply to the new facility[5] and directing the parties to "enter into negotiations leading to a permit that will allow [petitioner] and its licensed blind vendor or vendors to operate the retail store" at the Baltimore site. Pet. App. 39a. The arbitration panel further ordered that, if the parties failed to agree on such a permit by a specified date, each party should submit a proposed permit and the permit preferred by the majority of the panel would become the panel's final award. *Ibid.* The panel ultimately issued a final order denying respondent's motion for reconsideration, adopting the only permit proposed (that of petitioner), and directing respondent to "turn over the operation of the retail store" at the Baltimore site to petitioner. *Id.* at 5a-6a, 39a-41a.

3. Petitioner brought the instant action in the United States District Court for the District of Maryland, seeking enforcement of the arbitration

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[5] Respondent initially took the position that the Randolph-Sheppard Act was inapplicable to its medical facilities because of the Veterans' Canteen Service Act (VCS Act), 38 U.S.C. 7801 *et seq.* The VCS is an independent unit within the Department of Veterans Affairs established "for the primary purpose of making available to [hospitalized] veterans * * * at reasonable prices, articles of merchandise and services essential to their comfort and well-being." 38 U.S.C. 7801. Respondent operates stores and canteens under the VCS Act in its hospitals where it deems it "necessary and practicable" to do so. Pet. App. 6a n.2; 38 U.S.C. 7802(1). The arbitration panel in this case concluded (with one panel member dissenting) that the then-recent decision in *Minnesota, Department of Jobs and Training* v. *Riley*, 18 F.3d 606 (8th Cir. 1994), controlled and required rejection of the argument that the Randolph-Sheppard Act does not apply to VA facilities. Pet. App. 34a-38a, 42a-45a. Respondent did not press that argument in the courts below. *Id.* at 21a.

panel's award. On cross-motions for summary judgment, the district court entered judgment for respondent. Pet. App. 17a-31a. The court held that the arbitration panel had exceeded its statutory authority by ordering respondent to take specific remedial action. *Id.* at 6a-7a, 26a-27a. The court reasoned that, "under the [Randolph-Sheppard Act] it is the role of the agency head, in this case the Secretary of Veterans Affairs, to remedy any violation of the Act." *Id.* at 26a (citing 20 U.S.C. 107d-2(b)(2)). The court expressed its agreement with the view of the Eleventh Circuit in *Georgia Department of Human Resources* v. *Nash*, 915 F.2d 1482 (1990), that an arbitration panel convened under Section 107d-2(b)(2) "has no remedial powers whatsoever. It may determine that certain of the federal entity's acts violate the Act, but the Act leaves responsibility for remedying the violation to the federal entity itself." Pet. App. 26a-27a (quoting *Nash*, 915 F.2d at 1492, and citing *United States* v. *Mississippi Vocational Rehabilitation for the Blind*, 794 F. Supp. 1344, 1352 (S.D. Miss. (1992)).[6]

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[6] At the suggestion of the district court, petitioner had added a plea for alternative relief, requesting that the court exercise its equity powers and order respondent to comply with the Act. Pet. App. 22a-25a, 27a. The court ultimately declined to grant such relief, however, concluding that the record as it stood did not show that respondent had violated the Act. *Id.* at 29a. The court also noted that it was not resolving various issues concerning respondent's order regarding alternative sites, which had been issued during the pendency of the court proceedings. See *id.* at 22a-25a, 27a-30a.

4. The court of appeals affirmed. Pet. App. 1a-14a. It ruled that "the plain language of § 107d-2(b)(2) limits the authority of an arbitration panel convened under § 107d-1(b) to a determination of whether the acts of the federal entity 'are in violation' of the substantive provisions of the Act." *Id.* at 9a. The court read Section 107d-2(b)(2) to provide "that a § 107d-1(b) arbitration panel will determine whether the federal entity is in violation of the Act, while the head of the federal entity will remedy the violation." *Id.* at 9a-10a. Thus, the court concluded, "the statute places the responsibility for ending the violation on the head of the federal entity and does not authorize a § 107d-1(b) arbitration panel to order the federal entity to take specific remedial action." *Id.* at 9a-10a.

The court of appeals pointed to the Eleventh Circuit's discussion of "the differences between the remedial procedures provided under § 107d-1(a) for complaints filed by blind licensees against the state licensing agency and those provided under § 107d-1(b) for complaints filed by the state licensing agency against a federal entity." Pet. App. 10a (citing *Nash*, 915 F.2d at 1491-1492); see note 2, *supra* (describing process for arbitration panel convened under Sections 107d-1(a) and 107d-2(b)(1), rather than Sections 107d-1(b) and 107d-2(b)(2)). The court agreed with the *Nash* court's view that, unlike an arbitration panel convened under Section 107d-1(a), a panel convened under Section 107d-1(b) does not have authority to order a specific remedy, but rather is limited by the text of the Act to a determination of whether the federal entity's acts "are in violation" of the Act. Pet. App. 11a (quoting *Nash*, 915 F.2d at 1492).

The court below declined to rule that a Section 107d-1(b) arbitration panel has broader authority

based on the statement in *Randolph-Sheppard Vendors of America* v. *Weinberger*, 795 F.2d 90, 109 (D.C. Cir. 1986), that the Secretary of Education "has broad remedial powers under the Act." Pet. App. 11a. The court noted that that statement was not supported by any articulated rationale or any explanation of the effect of the language in Section 107d-2(b) that specifies that the head of the federal entity has the responsibility to remedy any statutory violations found by the arbitration panel. *Id.* at 11a-12a.

ARGUMENT

1. Petitioner contends (96-1550 Pet. 11) that the court of appeals' ruling constitutes a "complete disregard of the presumption applied in this Court's decisions approving remedies when findings have been made that federal law has been violated." Petitioner argues (*id.* at 11-16) that the court should have interpreted the Randolph-Sheppard Act to authorize arbitration panels convened under Section 107d-2(b)(2) to enter specific remedial orders, relying on a presumption in favor of all appropriate relief drawn from *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992), and the cases cited therein.[7]

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[7] See also 96-1551 Pet. 22, 27 (asserting that court of appeals' ruling is inconsistent with *Franklin*, thereby creating constitutional problems, and is in tension with federal labor law); Wisconsin Academy of Trial Lawyers et al. *Amici* Br. 18-20 (urging Court to grant review to fashion judicial remedy under *Franklin*). It does not appear that any constitutional claims were raised in the courts below. Petitioners apparently did not raise an argument under *Franklin* in the courts below, although it was discussed in an *amicus* brief on appeal and in the intervenors' rehearing petition. See Nat'l Federation of the Blind et al. C.A. *Amici* Br. 17-19; C.A. Pet. for Rehearing

The court of appeals correctly interpreted the Act as limiting the authority of an arbitration panel convened under Section 107d-2(b)(2) to the making of a determination whether "acts or practices" of a federal entity are in violation of the Act or regulations issued thereunder. If the arbitration panel finds that the federal entity's acts or practices are in violation of the Act or regulations, the plain language of the Act commands the head of the federal entity to rectify the violation—the federal entity head must "cause such acts or practices to be terminated promptly" and must "take such other action as may be necessary to carry out the decision of the panel." 20 U.S.C. 107d-2(b)(2). The court of appeals thus accurately ruled that "the statute places the responsibility for ending the violation on the head of the federal entity and does not authorize a § 107d-1(b) arbitration panel to order the federal entity to take specific remedial action." Pet. App. 10a.

The Court's ruling in *Franklin* does not suggest otherwise. As this Court recently explained, *Franklin* involved an action against non-federal defendants, and the presumption on which the Court relied in that case cannot trump federal statutory provisions that limit the remedial scheme that is available in a matter involving a federal agency. See *Lane* v. *Pena*, 116 S. Ct. 2092, 2098-2099 (1996); see also *Franklin*, 503 U.S. at 68 (presumption applies only where Congress has not expressed a contrary intent).

2. Petitioners assert (96-1550 Pet. 17-18; 96-1551 Pet. 11-16) that the court of appeals' decision conflicts with the decisions in *Randolph-Sheppard Vendors of*

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and Suggestion of Rehearing In Bar[illegible] Nat'l Federation of the Blind et al. 11, 15.

America v. *Weinberger*, 795 F.2d 90 (D.C. Cir. 1986), and *Minnesota Department of Economic Security* v. *Riley*, 107 F.3d 648 (8th Cir. 1997).

a. The court below did not, as petitioners suggest (96-1550 Pet. 17; 96-1551 Pet. 11-12), expressly disagree with the ruling of the D.C. Circuit in *Weinberger*. It simply declined to read into dicta in the *Weinberger* opinion an interpretation of the Act that is inconsistent with the plain statutory language.

The *Weinberger* court did not address the question presented by the instant case. It involved an action brought in federal district court directly against the head of a federal entity that controlled federal properties (military bases) to challenge two government contracts for the construction and operation of fast-food restaurants on those properties. 795 F.2d at 92. None of the plaintiffs had sought arbitration under the Act, and the D.C. Circuit ruled that the suit was barred because the plaintiffs had failed to exhaust the Act's administrative remedies, which the court concluded were mandatory. *Id.* at 93.

In the course of its discussion of the exhaustion issue (see 795 F.2d at 100-111), the *Weinberger* court considered whether various exceptions to the exhaustion doctrine should apply, including whether the plaintiffs would suffer irreparable injury absent immediate judicial review. The court concluded that no such injury would result based on a series of factors, including that there was no unusual delay in the administrative process, the administrative process might yield relief if a violation were found, and a stay could have preserved the plaintiffs' rights. *Id.* at 107-111. In its description of the possible relief available in the administrative process, the court stated that it "appears," that it "may well be," and

that it "might well be" that the Secretary could provide broad remedies against the federal entity if the panel found statutory or regulatory violations. *Id.* at 109. Due to the context in which the statements were made, the court did not provide a supporting rationale for that speculation. Because the court did not have before it an actual arbitration panel order that purported to grant specific remedial relief against a federal entity, the court did not actually rule on the scope of the remedies available from an arbitration panel against a federal entity. Such speculation about what type of relief might be available from an arbitration panel cannot carry great weight, and does not in any event give rise to a circuit conflict.[8]

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[8] The court of appeals' ruling also does not conflict with other cases cited by petitioners (96-1551 Pet. 10-11) that focused primarily on the debate about whether exhaustion of administrative remedies is mandatory under the Act. See, *e.g.*, *Fillinger* v. *Cleveland Society for the Blind*, 587 F.2d 336, reh'g denied, 591 F.2d 378 (6th Cir. 1978); *New York* v. *United States Postal Service*, 690 F. Supp. 1346, 1349 (S.D.N.Y. 1989); and *Massachusetts Elected Comm. of Blind Vendors* v. *Matava*, 482 F. Supp. 1186, 1189 (D. Mass. 1980). Those cases did not hold that an arbitration panel convened under Section 107d-2(b)(2) is authorized to order a federal entity to take specific remedial action.

Other cases cited by petitioners (96-1550 Pet. 18; 96-1551 Pet. 11, 15) are readily distinguishable as well because they involved arbitration panels convened under Section 107d-2(b)(1) (not under Section 107d-2(b)(2)), and addressed issues regarding the availability of damages against a State. See, *e.g.*, *Tennessee Dep't of Human Servs.* v. *United States Dep't of Educ.*, 979 F.2d 1162, 1165 (6th Cir. 1992); *McNabb* v. *United States Dep't of Educ.*, 862 F.2d 681, 684 (8th Cir. 1988) (Lay, C.J., concurring and dissenting), cert. denied, 493 U.S. 811 (1989); *Delaware Dep't of Health & Social Servs.* v. *United States Dep't of Educ.*, 772 F.2d 1123, 1136 (3d Cir. 1985). The

b. The court of appeals' decision also does not conflict with the Eighth Circuit's recent decision in *Minnesota Department of Economic Security* v. *Riley*, 107 F.3d 648 (1997). The *Riley* court explicitly noted that its ruling does not raise the concerns addressed by the ruling in the instant case or in *Georgia Department of Human Resources* v. *Nash*, 915 F.2d 1482 (11th Cir. 1990), because the arbitration panel in that case "never ordered the [federal entity] to take any remedial action, but simply decided" that certain action "would violate the Act." 107 F.3d at 650. The Eighth Circuit emphasized that the arbitration panel in that case "did exactly what the statute authorizes." *Ibid.* The *Riley* court's ruling that a federal entity cannot ignore its statutory responsibility to bring itself into compliance with the Act is not inconsistent with the ruling below.[9] The ruling below does not suggest that a federal entity

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statutory text makes clear that the authority of an arbitration panel under Section 107d-2(b)(1) is different in relevant respects from that of an arbitration panel under Section 107d-2(b)(2), so that those cases do not conflict wit the ruling below. See note 2, *supra*; see also State of Colorado et al. *Amici* Br. 15-16 (conceding that such cases are not directly on point but suggesting that they add confusion to the issue).

[9] The attempt by petitioners (see 96-1551 Pet. 11, 13-14) to create a conflict between the ruling below and an earlier Eighth Circuit decision fails for the same reason. The court there did not address the issue presented here. It affirmed the district court's ruling that had set aside an arbitration panel order allowing the parties to negotiate an agreement outside the Act's permit requirements. *Minnesota, Dep't of Jobs and Training* v. *Riley*, 18 F.3d 606, 608 (1994). In doing so, the court merely affirmed the principle that it later emphasized in its other *Riley* opinion—that federal entities subject to the Act must abide by the Act's requirements. *Ibid.*

can evade its obligations under the Act. Moreover, the district court suggested that, if a federal entity advances a remedy that is plainly inadequate, the state licensing agency would not be precluded from challenging that remedy through an independent APA action, although it declined to engage in such review based on the circumstances of this case. See note 6, *supra*.[10]

c. The ruling below is consistent with the analysis of the other federal courts that have discussed the question. See *Nash*, 915 F.2d at 1487-1495; *United States* v. *Mississippi Vocational Rehabilitation for the Blind*, 794 F. Supp. 1344 (S.D. Miss. 1992). Those courts have similarly opined that an arbitration panel convened under Section 107d-2(b)(2) to resolve a dispute between a state licensing agency and a federal entity has no remedial authority. As the *Nash* court recognized, Congress's inclusion of language in Section 107d-2(b)(2) limiting the panel's authority to resolution of whether a federal entity has violated the Act and imposing on the federal entity the obligation to end the violation, while omitting such language from Section 107d-2(b)(1), establishes that Congress acted intentionally when it limited the remedial authority of Section 107d-2(b)(2) arbitration panels. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in

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[10] The district court indicated that it would have jurisdiction to review final agency action of respondent, but declined to do so because petitioner had not made an adequate factual showing. Thus, there is no merit to petitioners' argument (96-1551 Pet. 20-22) that the decision below creates a constitutional due process problem. See also note 7, *supra* (constitutional claims not raised below).

another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); see also *Brown* v. *Gardner*, 513 U.S. 115, 120 (1994).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 96-1550 and 96-1551

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MARYLAND STATE DEPARTMENT OF EDUCATION,
DIVISION OF REHABILITATION SERVICES,
Petitioners,

v.

DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

THE NATIONAL FEDERATION OF THE BLIND
and DONALD J. MORRIS,
Petitioners,

v.

DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS NFB AND MORRIS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONERS NFB AND MORRIS

Pursuant to this Court's Rule 15.6, the National Federation of the Blind and Donald J. Morris (collectively, "NFB"), Petitioners, make this Reply to the new points raised in the Federal Responents' Brief in Opposiiton to their Petiiton for a Writ of Certiorari.

Respondents argue that there is no conflict between the Circuits as to the issue in the case at bar. Eighteen States and the national association that represents State agencies for the blind have filed *amici* briefs, however, arguing that

the decision of the Court below deepens an existing conflict among the Circuits and causes serious confusion regarding the Randolph-Sheppard Act ("RSA") throughout the Country. This Court has deemed the involvement of a State as a Petitioner for a Writ of Certiorari to be an important factor in deciding to grant or deny Certiorari (*New York v. United States*, 326 U.S. 572, 574 (1946)), and thus, *a fortiori*, the strongly expressed concerns of so many States should be given substantial weight by the Court in the case at bar.

I. THE RESPONDENTS HAVE MISREAD AND MISAPPLIED THIS COURT'S DECISIONS IN *FRANKLIN* AND *PENA*

Within the meaning of this Court's Rule 15.6, Respondents raise a new point when they argue that *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), is inapposite because the Respondents represent a federal agency.[1] Respondents' Brief, p. 10. Respondents misunderstand *Franklin*. The seminal case of *Bell v. Hood*, 327 U.S. 678 (1946), upon which *Franklin* is directly premised, involved an action against a federal agency (*Id.*, 327 U.S. 679-80, 684), and, as the *Franklin*

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[1] The Respondents do not argue, nor could they, that the Act has been unfairly applied to them. The Respondents acknowledge that the Act is "a cooperative federal/state program for licensing, training and placing qualified blind persons as operators of vending facilities on federal property." Respondents Brief, p. 2. The Respondents have acknowledged without objection that the Act applies to them. Respondent's Brief, p. 6, n.5. The States voluntarily undertake to insure the working conditions of blind vendors on federal property and must apply to the United States Secretary of Education for permission to license blind vendors to work on that federal property. *Delaware Department of Health and Social Services v. United States Department of Education*, 772 F.2d 1123, 1130-32 (3d Cir. 1985). As pointed out by the National Council of State Agencies for the Blind in its Amici Brief, at pp. 13-20, the Act is not enforced against the Respondents by the States, but by the Secretary of Education pursuant to his authority under 20 U.S.C. § 107(b) and by and through the arbitration panels convened by the Secretary of Education under the Act.

Court noted, the ancient doctrine that there can be no right without a remedy has from time immemorial been applied to Acts of Congress designed to vest citizens with rights against federal agencies ("[t]he Court applied these principles to an Act of Congress that accorded a right of action in mail carriers to sue for adjustment and settlement of certain claims for extra services but which did not specify the precise remedy available to the carriers," *Id.*, 503 U.S. at 66).

A. The *Pena* decision, relied on by Respondents, actually supports the position of the Petitioners

Lane v. Pena, 116 S. Ct. 2092 (1996), the only decision relied on by the Respondents to "distinguish" *Franklin*, in fact supports the position of the Petitioners that an RSA panel arbitration award ought to be enforceable in federal court. The case at bar would not exist if the Courts below had enforced the award of the RSA panel below by granting injunctive relief in favor of the State licensing agency ("SLA") requiring the Respondents to surrender space for a blind vendor stand. That was the only relief sought by the SLA below. 896 F. Supp. 514. The award made by the RSA panel below was clearly injunctive in nature,[2] and only injunctive relief is at issue in the case at bar. *Pena* involved an attempt to impose a damage remedy on a federal agency, but did not in any sense foreclose injunctive relief against that agency.[3] As this Court made clear in *Pena*, "The question presented [in *Pena*] is whether Congress has waived the Federal Government's sovereign immunity against *awards of monetary damages* [Emphasis sup-

[2] "On October 15, 1994, the [RSA] arbitration panel issued its final order in which it directed the DVA to turn over to Maryland the operation of the retail store already located at the VAMC, . . ." 98 F.3d 168.

[3] In fact, the federal government in *Pena* did not "contest the propriety of injunctive relief" against it under *Franklin*, but only argued that "the Federal Government's sovereign immunity prohibits *wholesale application of Franklin* to actions against the Federal Government to enforce § 504(a) [Emphasis supplied]." *Pena, Id.* at 2099.

plied]."[4] *Pena, Id.*, 116 S.Ct. at 2095. *Pena* has no application to the case at bar.

B. The Respondents misconstrue the concept of "Remedy," as that term is used by this Court in *Franklin*

Under *Franklin*, the power to grant a remedy involves nothing less than the duty of a federal court "to award appropriate relief in cases brought in our court system." *Franklin, Id.*, 503 U.S. at 74. The failure of federal courts to enforce remedies provided by Congress actually violates the Separation of Powers doctrine "by giving judges the power to render inutile causes of action authorized by Congress through a decision that no remedy is available." *Id.*

Respondents do not attempt to address the authorities cited in the NFB's Petition at 26-28, that strongly support the conclusion that when Congress mandated that disputes under the RSA be resolved by an arbitration panel the Congress *did not* use "arbitration" in a different sense from that employed in other laws in effect at the time of the 1974 Amendments to the RSA. A commitment to arbitration by Congress in 1974 includes a policy judgment that arbitrators are to adjudicate all of the issues of a dispute under 20 U.S.C. § 107d-1, including the determination of a remedy.

Respondents' argument regarding *Franklin* also indirectly raises for the first time the power of a court to review a decision of an arbitrator. Under arbitration law as it clearly existed in 1974, and which the Congress undoubtedly considered when it employed the concept of final and binding arbitration in the 1974 Amendments

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[4] The NFB does not concede that an RSA panel cannot award monetary damages against a federal agency under the Act. Certainly, it could be argued that the Congress has waived sovereign immunity by enacting the RSA. However, the issue of monetary damage relief is not before the Court under the facts of the case at bar.

to the RSA, "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration. . ." *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 596 (1960). Judicial review is nevertheless necessary, but "courts have essentially one role—to place government authority behind an award in order to enforce it." *Armco Employees Independent Federation, Inc. v. Armco Steel Co.*, 65 F.3d 492, 495-96 (6th Cir. 1995). The failure of the Court below to enforce an award of an arbitration panel also contravenes the intent of Congress in making every arbitration award under the RSA "subject to . . . review as a final agency action" under the APA. 20 U.S.C. § 107d-2(a). *See Abbott Laboratories, et al. v. Gardner*, 387 U.S. 136, 139-40 (1967) ("the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable interpretation' ").

II. THE BRIEF FOR THE FEDERAL RESPONDENTS SHOWS THERE IS CONFUSION, AND IGNORES CONFLICTS, IN THE FEDERAL COURTS' INTERPRETATION OF THE RANDOLPH-SHEPPARD ACT

Respondents argue that no conflict or confusion exists in the courts below. These attempts to raise new points, within the meaning of this Court's Rule 15.6, are not well taken. In a case ignored by the Respondents, *Texas State Commission for the Blind v. United States*, 796 F.2d 400 (Fed. Cir. 1986),[5] an RSA panel awarded $10 million dollars against a federal agency. *Id.*, 403-406. The federal government vigorously contested that award, but it did not question the arbitration panel's authority to make such an award, nor did any of the ten judges of the Federal Circuit in that case question the panel's basic authority to make such an award. The *Texas* decision clearly conflicts with the decisions of the Courts below that an RSA panel "has no remedial powers whatsoever."

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[5] Cited at pp. 4 and 11 of the NFB's Petition and discussed at p. 15 of same.

Respondents dismiss the decision in *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90 (D.C. Cir. 1986) as dicta. In fact, the Court in *Weinberger* confronted a fact situation which demanded that it consider carefully the remedial powers of an RSA panel convened to resolve a dispute between an SLA and a federal agency, and its discussion of the remedial powers of such a panel forms an indispensable part of its holding.

Weinberger involved very large contracts between federal agencies and the Burger King and McDonald fast food corporations. *Id.* The Court in *Weinberger*, squarely faced with a challenge to the validity of those contracts, concluded, by specific reference to 20 U.S.C. § 107d-2 (*Id.*, at 109), that there were a wide variety of remedies available by means of arbitration, including even invalidation of those contracts, limitations on making such contracts in the future, and other "prospective relief." *Id.* Far from dicta, a determination of the remedial powers of an RSA panel was a necessary element of the Court's reasoning that enabled the Court to determine that the parties could and must place their dispute, including remedies, before an RSA panel and exhaust their administrative remedies before seeking relief in federal court.

Perhaps most telling, however, the Court below did not dismiss as dicta but instead specifically declined to follow *Weinberger*, on the ground that the District of Columbia Circuit's construction of the RSA failed to give full effect to all of the language of the RSA. *Maryland, Id.*, 98 F.3d at 170. This Court has often granted Certiorari when there is a conflict among the Circuits as to the construction of a statute that impacts on the proper administration of an Act of Congress. *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962) (there was a conflict and "the need for a uniform rule on the point"); *Minnesota Mining Co. v. New Jersey Wood Co.*, 381 U.S. 311, 314 (1965) and *Shapiro v. United States*, 335 U.S. 1, 4 (1948) ("because this conflict involves an important question of statu-

tory construction"); *See also, United States v. Ruzicka*, 329 U.S. 287 (1946).

Respondents seize upon the Eighth Circuit's strained conclusion in *Minnesota Department of Economic Security v. Riley ("Riley II")*, 107 F.3d 648 (8th Cir. 1997), that the decision of the Court below is not in conflict with the Eighth Circuit's decision, without considering the obvious. As noted by the Commonwealth of Virginia, et al., *Amici* Brief, 14-15, in the Eighth Circuit an SLA of a State can have an arbitration award of an RSA panel enforced in Court (107 F.3d at 649), but an SLA in the Fourth Circuit cannot. At minimum, there is confusion in the two Circuits concerning the power of a federal court to enforce an arbitration award of a panel under the Act. In other words, there is a disagreement between the Circuits as to the very basic question of how the RSA is to be enforced in those Circuits, and this Court has granted Certiorari when such a conflict threatens to become a serious hindrance to the effective administration of an Act of Congress. *Rothensies v. Electric Battery Co.*, 329 U.S. 296 (1946).

Respondents dismiss the other cases that conflict with the decision below in a footnote (Respondents' Brief, 12, n.8), without providing any meaningful discussion of the basis for their conclusion. For example, Respondents argue that *Delaware Department of Health & Social Services v. United States Department of Education*, 772 F.2d 1123 (3rd Cir. 1985), is inapposite because it involves on its facts 20 U.S.C. § 107d-2(b)(1).[6] In fact, the *Delaware* decision contains a thoughtful and careful anal-

[6] In so doing, Respondents overlook the fact that the Courts below rely primarily on *Georgia Department of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990), which case also involves on its facts 20 U.S.C. § 107d-2(b)(1). In a real sense, however, the Respondents do both the Court and the cause of justice a favor because this underscores as nothing else could the confusion among the Circuits.

ysis of the common underpinnings of panels convened pursuant to both 20 U.S.C. § 107d-2(b)(1) and (b)(2). Based on that analysis, the Court in *Delaware* concluded that because blind vendors are third party beneficiaries of the relationship between the States and the federal government (*id.*, at 1127), arbitration of disputes between SLAs and federal agencies "were included primarily to deal with the disputes which had often arisen in the administration of the Randolph-Sheppard Program when certain federal departments were unwilling to provide sites for blind vendors." *Id.*, at 1129.

CONCLUSION

The serious confusion among the Circuits concerning the Act was captured best by the authors of the Commonwealth of Virginia, et al.'s *Amici* Brief in support of the Petitions herein for Certiorari:

> The current status of the law is that 1) in the Third Circuit (*see Delaware Dept. of Health*), a blind licensee may recover compensatory damages and attorneys' fees in an arbitration against a State licensing agency under § 107d-1(a); 2) in the Eleventh Circuit (*see Nash*)—and probably in the Fourth Circuit, in view of its reliance on *Nash* in the decision below—an RSA arbitration panel may not grant *any* form of relief in an arbitration under the same statute; 3) in the Fourth Circuit (*see* decision below), a § 107d-1(b) arbitration panel has no remedial authority and a district court may not enforce its decision; and 4) in the Eighth Circuit (*see Riley II*) the remedial authority of a § 107d-1(b) arbitration panel is not clear, but it *is* clear that a district court may enter an injunction enforcing a panel's decision; and 5) at least in Colorado (*see Hudson v. Boxer*, 632 F. Supp. 1569 (D. Colo. 1986) [and in Wisconsin, *see Howe v. Bolger*, 35 CCH EPD 34,822 (E.D. Wis. 1984)], blind vendors may obtain a preliminary

> injunction against State officials to maintain the status quo pending arbitration.

Commonwealth of Virginia, et al. Amici Brief, pp. 15-16.

Clearly, the enforceability of the rights of the blind under the RSA varies tremendously with geography. If nothing else, there is a great deal of confusion concerning the meaning of the RSA and, as noted in the NFB's Petition, this Court ought to grant Certiorari just to resolve that confusion. Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* 180 (BNA 7th Ed. 1993). Certainly, there "appears" to be a conflict among the Circuits, and such an appearance of a conflict has been the basis in the past of this Court's assertion of Certiorari Jurisdiction. *See Saxbe v. Washington Post Co.,* 417 U.S. 843, 846 (1974) ("an apparent conflict in approach"); *United States v. National Bank of Commerce,* 472 U.S. 713, 719 (1985) ("appeared to us to conflict, directly or in principle, with decisions of other Courts of Appeals"); *Oregon Dept. of Fish and Wildlife v. Klamath Tribe,* 473 U.S. 753, 764 (1985) ("appeared to conflict in principle").

The Randolph-Sheppard Act creates rights to economic opportunity for a distinctly disadvantaged class in American society. None of the briefs filed in this case, including the Respondents' Brief in Opposition, question the rights defined and declared by Congress in the Randolph-Sheppard Act. However, the Petitions and the briefs filed in this case, including the Respondents' Brief in Opposition, manifest confusion and conflict about the procedure for securing those rights. Blind citizens nationwide, and their patron SLAs in the fifty States, deserve to know from this Court, finally, what the proper procedure is for securing those rights.

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